Supreme Court, U.S.
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No.

IN THE
Supreme Court of the United States

BARKER SANITATION
Petitioner

v.

THE CITY OF NEBRASKA CITY, NEBRASKA
Respondent

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The question presented is whether the court of appeals properly affirmed the district court's holding that Nebraska City Ordinance 2505-2000 did not violate the dormant Commerce Clause.

PARTIES TO PROCEEDING

Petitioner is Barker Sanitation. Respondents are the City of Nebraska City, Nebraska and Waste Connections of Nebraska, Inc.

CORPORATE DISCLOSURE STATEMENT

Barker Sanitation is an Iowa corporation owned by Michael Barker and members of the Barker family.

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PETITION FOR WRIT OF CERTIORARI

Barker Sanitation respectfully seeks certiorari to review the judgment of the Eighth Circuit Court of Appeals which affirmed the conclusions of the United States District Court for the District of Nebraska. The district court held that Nebraska City Ordinance 2505-2000 did not violate the interstate commerce clause.

OPINIONS BELOW

The opinions of the court of appeals (App., *infra*, 1a-3a) and the district court (App., *infra* 4a-32a) are unpublished.

JURISDICTION

The judgment of the court of appeals was entered on June 25, 2004. This petition for certiorari is timely in that Petitioner has filed it within 90 days of June 25, 2004. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Commerce Clause of the United States Constitution provides in relevant part that "Congress shall have power... To regulate Commerce...among the several states..." U.S. CONST. Art. I, § 8, cl. 3. The Commerce

Clause also directly limits the power of the States to discriminate against interstate commerce. Nebraska City Ordinance 2505-2000 is reproduced in its entirety as Attachment A, (App., *infra* 33a).

STATEMENT OF THE CASE

I. Background of the Case

Nebraska City built a transfer station in response to Nebraska's Integrated Solid Waste Management Act (Neb. Rev. Stat. § 13-2001 *et seq.*). The transfer station was funded by public bonds. In 1997, Nebraska City became concerned about the drop in tonnage at the transfer station due to "so much competition for solid waste." (App., *infra*, 7a). Garbage haulers from Nebraska, Iowa, and Missouri were servicing Nebraska City customers and taking the waste to transfer stations in Iowa and Missouri for processing because they had lower tipping fees. Nebraska City sought to implement a measure to keep the tonnage in Nebraska and thus increase volume at its transfer station. (App., *infra*, 7a). Nebraska City decided to issue an exclusive franchise for the collection of solid waste in Nebraska City provided that prospective bidders "will agree...to deliver to the Nebraska City Area Solid Waste Agency Transfer Station all solid waste collected within the City Limits and destined for landfill disposal subject to the currently applicable tipping fees." (App., *infra*, 8a).

Ultimately, after several months of meetings an negotiations with Waste Connections, Nebraska City was advised by its legal counsel, John Heil, that an exclusive franchise agreement for waste collection coupled with a lease agreement for the Transfer Station, each at the rate of $7,000 a month, would cover the $14,000 a month necessary for the City to meet its bond obligation for the Transfer Station. (App., *infra,* 12a) Council minutes provided: "The lease, which is subject to the franchise agreement, is a seven [-] year lease with a seven [-] year renewal option. This matches the fourteen [-] year bond repayment schedule." (App., *infra,* 12a) The franchise agreement and lease entered into between the Respondents were codified by Nebraska City in Ordinance 2505-2000. The ordinance imposes criminal penalties on any garbage hauler who attempts to service Nebraska City customers.

In February, 2002, Barker Sanitation, an Iowa corporation, began providing garbage hauling services to customers within Nebraska City, Nebraska. (App., *infra,* 16a) Barker Sanitation's normal routine was to pick up the garbage in Nebraska City and transport it back over the border to unload it at a transfer station in Iowa. On May 9, 2002 Barker Sanitation received a letter from Nebraska City's legal counsel notifying Barker that it was violating the ordinance and franchise agreement. The letter warned that violation of the ordinance could result in criminal fines or imprisonment and that each day that Barker Sanitation serviced customers in Nebraska City would constitute a separate offense. Nebraska City's legal counsel warned

Barker Sanitation to cease and desist immediately, as the City intended to enforce the terms of the ordinance.

On September 25, 2002, Petitioner's legal counsel sent a letter to Nebraska City which characterized the City's ordinance as "improper flow control" which violates "the dormant provisions of the Interstate Commerce Clause." (App., *infra,* 16a) On October 7, 2002, the City Council met to address Petitioner's letter at which time the Mayor commented:

> It was probably pertinent and important that maybe it's time that we go back to the citizens and explain one more time why we're in the position we are and the reason for the cost of the fees being as high as they are is because they have the bond payments, have to make the bond payments, and that the fee structure and the agreement for the lease fixed that, I mean, it was exact amount. We know what payment to the bonds are. That's why we are paying what we are paying for the garbage rates.

Barker Sanitation filed this action alleging that Nebraska City Ordinance 2505-2000 was passed and enforced by the City as part of a flow control scheme developed through creating the exclusive franchise agreement and transfer station lease. Barker Sanitation

further alleges that the ordinance discriminates against interstate commerce because the purpose of the ordinance was to enact a financing measure strictly for economic protection resulting in a discriminatory effect of preventing out-of-state competition for the processing of Nebraska City's solid waste. As such, the ordinance unreasonably interferes with and materially restricts the free flow of interstate commerce and the ordinance unduly burdens interstate commerce.

II. Proceedings Below

At trial the district court found in favor of the City of Nebraska City and Waste Connections of Nebraska, Inc. The district court held that the ordinance was not discriminatory on its face, in its purpose, or in its effects and thus did not violate the dormant provision of the Commerce Clause. The district court also held that the ordinance's burden on interstate commerce was incidental under the *Pike* balancing test. (App., *infra*, 4a-32a). On appeal, the Eighth Circuit held that the district court "properly analyzed the case". The Eighth Circuit did not engage in any further discussion of the case. (App., *infra*, 1a - 3a).

REASONS FOR GRANTING THE PETITION

Supreme Court Rule 10 identifies considerations used by the Court in deciding whether to exercise its discretion to grant a petition for writ of certiorari. One

consideration is that a "United States court of appeals has decided an important question of federal law...that conflicts with relevant decisions of this Court." Review is warranted because the court of appeals affirmed a decision by the district court that conflicts with several of the Supreme Court's precedents relating to the clearly established dormant Commerce Clause of the United States Constitution.

1. The court of appeals, without discussion, upheld the district court's findings of fact and conclusions of law. (App., *infra*, 1a). The court of appeals erred in affirming the district court's determination that Nebraska City Ordinance 2505-2000 was not a flow control scheme implemented in order to control the processing of solid waste and hoard the economic benefit purely for the purpose of protecting a local economic interest. The decisions by the court of appeals and the district court are in direct conflict with *C.A. Carbone, Inc. v. Town of Clarkstown, New York*, 511 U.S. 383, 114 S.Ct. 1677 (1994).

The facts of *Carbone*, are that Clarkstown agreed to allow one private contractor to construct a solid waste transfer station to separate recyclable from non-recyclable items and to operate the facility for five years. At the end of the five years the town would buy the transfer station for one dollar. To finance the transfer station cost, the Town of Clarkstown guaranteed a minimum waste flow to the facility for which the contractor could charge the hauler a

tipping fee which exceeded the disposal cost for unsorted solid waste on the private market. In order to make this whole scheme work, the Town of Clarkstown adopted a flow control ordinance which required all nonhazardous solid waste within the town to be deposited at the transfer station. In analyzing the scheme, the Court, in an opinion by Justice O'Connor, concluded:

> We consider a so called flow-control ordinance, which requires all solid waste to be processed at a designated transfer station before leaving a municipality. The avowed purpose of the ordinance is to retain processing fees charged at the transfer station to amortize the cost of the facility. Because it attains this goal by depriving competitors, including out of state firms, of access to a local market, we hold the flow-control ordinance violates the Commerce Clause.

C & A Carbone, Inc. v. Town of Clarkstown, New York, 511 U.S. 383, 386, 114 S.Ct. 1677 (1994).

The Court also stated in *Carbone*, that "[f]avoring a single local proprietor makes the ordinance's protectionist effect even more acute, for it squelches competition in the waste-processing service altogether, leaving no room for outside investment." *C & A Carbone, Inc. v. Town of Clarkstown, New York*, 511 U.S. 383, 384,

114 S.Ct. 1677 (1994). In the present case, the City has not entered into a five year deal but rather a fourteen year arrangement to cover its debt obligations.

As with the Town of Clarkstown, the purpose of Nebraska City for passing the ordinance was to assure that the private operator, in this case Waste Connections, would have sufficient tonnage flowing through the transfer station. Also similarly, there is no justification that such an ordinance would protect the public health, safety and welfare. The district court found that Nebraska City Ordinance 2505-2000 was admittedly an economic motive. (App., *infra*, 33a - 34a).

Nebraska City Ordinance 2505-2000, which codified the franchise agreement and transfer station lease, is overtly discriminatory because it was entered into for the purpose of protecting the financial viability of the transfer station by hoarding solid waste to the local transfer station and preventing out of state competition from servicing waste generated in Nebraska City. This is the exact purpose that the Commerce Clause was promulgated to prevent, and for which the Court in *Carbone* found to be in violation of the Commerce Clause. The court of appeal's affirmation of the district court's finding is inconsistent with *C & A Carbone, Inc. v. Town of Clarkstown*, and warrants granting this Petition.

2. Review is warranted because the court of appeals erred in affirming the district court's determination that

Nebraska City Ordinance 2505-2000 was not a local processing requirement that violates the dormant commerce clause. The decisions by the court of appeals and the district court are inconsistent with *C & A Carbone, Inc. v. Town of Clarkstown, New York*, 511 U.S. 383, 114 S.Ct. 1677 (1994); *Wyoming v. Oklahoma*, 502 U.S. 437, 112 S.Ct. 789 (1992); *South Central Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82 (1984); *Dean Milk Co. v. Madison*, 340 U.S. 349 (1951); *Foster-Fountain Packing Co. v. Haydel*, 278 U.S. 1 (1928); *Minnesota v. Barber*, 136 U.S. 313 (1890).

The Court in *C & A Carbone, Inc. v. Town of Clarkstown*, found that ordinance was "merely another example of the type of local processing requirement that the Court [has] invalidated with monotonous regularity." *C & A Carbone, Inc. v. Town of Clarkstown, New York*, 511 U.S. 383, 391-92, 114 S.Ct. 1677 (1994). As the Court understood in *Carbone*, "[w]hat makes garbage a profitable business is not its own worth but the fact that its processor must pay to get rid of it." *C.A. Carbone, Inc. v. Town of Clarkstown, New York*, 511 U.S. 383, 384, 114 S.Ct. 1677 (1994).

In the present case, as in *Carbone*, the issue is not whether the waste ultimately ended up in an in-state or out-of-state landfill, but rather an ordinance that hoards waste for local processing at the transfer station at the cost of interstate commerce.

3. Review is also warranted because the court of appeals erred in affirming the district court's opinion that because a small amount of solid waste was not processed in Nebraska City, that Nebraska City Ordinance 2505-2000 did not have a discriminatory effect. The decisions by the court of appeals and the district court are inconsistent with *Wyoming v. Oklahoma*, 502 U.S. 437, 112 S.Ct. 789 (1992).

In *Wyoming v. Oklahoma*, Oklahoma argued that since only some of the commodity, in this case coal, was reserved from interstate commerce, then an "overall burden" was not placed on interstate commerce. In the opinion by Justice White, this Court stated that, "[t]he volume of commerce affected measures only the extent of the discrimination; it is of no relevance to the determination whether a State has discriminated against interstate commerce." *Wyoming v. Oklahoma*, 502 U.S. 437, 455, 112 S.Ct. 789, 801 (1992).

In this case, district court found that since a small percentage of the waste was not capable of being processed by the transfer station and therefore was deposited directly in a landfill, then the ordinance did not have a discriminatory effect on interstate commerce. (App., *infra*, 19a-31a). This finding clearly contradicts the Court's guidance in *Wyoming v. Oklahoma*, that the volume of commodity hoarded is not determinative to the issue of whether the ordinance discriminates against interstate commerce. The court of appeal's affirmation of the district

court's finding is inconsistent with *Wyoming v. Oklahoma*, and warrants granting this Petition.

4. Review is warranted because the court of appeals erred in affirming the district court's determination that Nebraska City Ordinance 2505-2000 was not discriminatory despite its purpose of economic protectionism. The decisions by the court of appeals and the district court are inconsistent with *Philadelphia v. New Jersey*, 437 U.S. 617, 98 S.Ct. 2531 (1978) and *Hunt v. Washington Apple Advertising Commission*, 432 U.S. 333, 97 S.Ct. 3049 (1984).

In *Philadelphia v. New Jersey*, the Court stated that "regulations that operate as economic protectionism and serve to protect in-state economic interests at the expense of out-of-state competitors are per se invalid." *Philadelphia v. New Jersey*, 437 U.S. 617, 624, 98 S.Ct. 2531 (1978). The virtual per se rule applies even to an ordinance that has the effect of discriminating against interstate commerce, since "the evils of protectionism can reside in legislative means as well as legislative ends." *Philadelphia v. New Jersey*, 437 U.S. 617, 626, 98 S.Ct. 2531 (1978).

Nebraska City passed Ordinance 2505-2000 in an attempt to insulate the transfer station from competition with cheaper out-of-state alternatives and thus ensure that the transfer station was financially successful. Nebraska City's financial burdens as a result of the transfer station are not unique, however, "a state may not attempt to isolate

itself from a problem common to many by erecting a barrier against the movement of interstate trade. *Philadelphia v. New Jersey*, 437 U.S. 617, 628, 98 S.Ct. 2531 (1978)

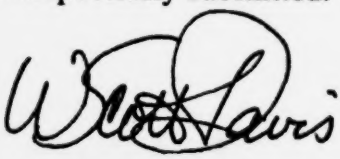
5. Review is warranted because the court of appeals erred in affirming the district court's determination that Nebraska City Ordinance 2505-2000 did not violate the Commerce Clause because its local benefits outweighed its incidental burden. The decisions by the court of appeals and the district court are inconsistent with *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 90 S.Ct. 844 (1970).

"A presumably legitimate goal cannot be accomplished by the illegitimate means of isolating the state from the national economy." Philadelphia at 627.

CONCLUSION

The petition for a writ of certiorari should be granted. The court of appeals affirmed a decision by the district court that conflicts with several of the Supreme Court's precedents relating to the clearly established jurisprudence of the dormant Commerce Clause of the United States Constitution.

Respectfully submitted.



W. SCOTT DAVIS
DOUGLAS J. PETERSON

SEPTEMBER 2004

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 03-3926

BARKER SANITATION, AN IOWA CORPORATION,
APPELLANT

v.

CITY OF NEBRASKA CITY, NEBRASKA; WASTE CONNECTIONS
OF NEBRASKA, INC.,
APPELLEE

[Argued: June 17, 2004
Opinion filed: June 25, 2004]

Before: MORRIS, SHEPPARD, ARNOLD, FAGG, and RILEY
Circuit Judges

OPINION OF THE COURT

PER CURIAM.

Following an open request for proposals in which three out-of-state solid wasted disposal entities submitted bids, the City of Nebraska City adopted an ordinance granting Waste Connections of Nebraska, Inc. an exclusive franchise to collect the solid waste within the City's limits. In conjunction with the ordinance, the City entered into a franchise agreement with Waste Connections. Later, Barker Sanitation, an Iowa corporation engaged in the business of refuse collection services, began serving waste collection customers in the City in violation of the ordinance. The City issued a cease and desist letter to Barker Sanitation, and Barker Sanitation appealed to the City Council, which decided to enforce the ordinance. In response, Barker Sanitation brought this civil rights action against the City asserting its adoption of the ordinance granting the exclusive franchise to Waste Connections violated the dormant Commerce Clause. Following a bench trial, the district court* held the City ordinance did not violate the dormant Commerce Clause.

To prevail on its dormant Commerce Clause claim, Barker Sanitation had the burden to show that the ordinance discriminates against interstate commerce on its face or in its purpose or effects, or that the burden the ordinance imposes on

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*The Honorable Richard G. Kopf, United States District Judge for the District of Nebraska.

interstate commerce is clearly excessive in relation to the asserted local benefits. South Dakota Farm Bureau, Inc. v. Hazeltine, 340 F.3d 583, 593 (8th Cir. 2003). The district court held the ordinance did not discriminate against out-of-state interests on its face, in effect, or in its purpose, and the numerous local benefits achieved were not outweighed by the incidental burdens on interstate commerce.

On appeal, Barker Sanitation contends the ordinance discriminates against interstate commerce through its purpose of economic protectionism and through its effect of preventing out-of-state companies from being able to compete for the processing of solid waste in the City. Barker Sanitation also asserts the district court erroneously found the ordinance had numerous local benefits that only incidentally burdened interstate commerce. Having carefully reviewed Barker Sanitation's arguments, the record, and the applicable law, we conclude the district court properly analyzed the case. Because we have nothing to add to the district court's analysis, we affirm without extended discussion. See 8th Cir. R. 47B.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

No. 4:02CV3330

BARKER SANITATION, AN IOWA CORPORATION,
PLAINTIFF

v.

CITY OF NEBRASKA CITY, NEBRASKA,
DEFENDANT

v.

WASTE CONNECTIONS OF NEBRASKA, INC.,
INTERVENOR DEFENDANT

[November 4, 2004]

KOPF, District Judge

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The plaintiff, Barker Sanitation, is an Iowa corporation that has been in business since February 1, 2002, as a refuse collection service. It claims that the defendant, City of Nebraska City, Nebraska, by granting an exclusive franchise to the intervening defendant, Waste Connections of Nebraska, Inc., and by preventing Barker from conducting its business in Nebraska City, has violated the dormant Commerce Clause, U.S. Const. art. I, § 8, cl. 3, and 42 U.S.C. § 1983, and has also deprived Barker of its property without just compensation in violation of the Fifth Amendment to the United States Constitution and Article I, sections 3 and 21, of the Nebraska Constitution.

I previously concluded that Barker lacks standing to claim that Nebraska City has taken Barker's business in violation of either the United States or Nebraska Constitutions, or to claim that awarding the exclusive franchise to Waste Connections was unconstitutional or was done contrary to any competitive bidding requirements. Specifically, I concluded that Barker does not have standing to claim that there was not a "level playing field" for other garbage haulers to obtain the exclusive franchise, or to claim that its property has been taken without just compensation. (Filing 64.)

However, I found a triable issue as to whether the City's solid waste disposal plan violates the dormant Commerce Clause because of "economic protectionism" and I held that Barker, which has been threatened with prosecution for encroaching upon Waste Connections' exclusive franchise, has standing to litigate

these issues. Therefore, the only issue that remained for trial was whether the City's exclusive franchise Ordinance for solid waste collection and the exclusive franchise agreement between Nebraska City and Waste Connections entered into pursuant to the terms of the Ordinance violate the dormant Commerce Clause. (Filing 53, Order on Pretrial Conf., ¶¶ B(1)-(8).) Following a bench trial on the merits of this case, I now issue my findings of fact and conclusions of law in accordance with Federal Rule of Civil Procedure 52(a).[1]

I. FINDINGS OF FACT

1. The plaintiff, Barker Sanitation, is an Iowa limited liability corporation in business as a refuse collection service since February 1, 2002. The defendant, City of Nebraska City, is an incorporated governmental entity organized and existing under the laws of the State of Nebraska. The intervening defendant, Waste Connections of Nebraska, Inc., is a Delaware corporation which operates a waste collection and disposal business in the State of Nebraska. (Filing 53, Order on Pretrial Conf. ¶¶ A(1)-(3).)

2. Nebraska's Integrated Solid Waste Management Act, Neb. Rev. Stat. Ann. §§ 13-2001 to 13-2043 (Lexis 1995 & Cum. Supp. 2002) requires municipalities like Nebraska City to "provide or contract for facilities and systems as necessary for the

[1]Any finding of fact more properly characterized as a conclusion of law, and any conclusion of law more properly deemed a finding of fact, should be so construed.

safe and sanitary disposal of solid waste generated within its solid waste jurisdiction area." Neb. Rev. Stat. Ann. § 13-2020(1) (Lexis Cum. Supp. 2002). The Nebraska City Area Solid Waste Agency (the "Agency") is a joint entity formed by the City of Nebraska City and the Village of Talmage, Nebraska, pursuant to Nebraska's Interlocal Cooperation Act, Neb. Rev. Stat. Ann. §§ 13-801 to 13-827, that is governed by a five-member board comprised of Nebraska City's mayor and city council members. The Agency's sole purpose is ownership of the Nebraska City Area Solid Waste Agency Transfer Station ("Transfer Station") and retirement of the bonds which were issued for its construction. The Agency does not become involved in, or regulate, trash collection in Nebraska City. (Tr. 92-93, 100, 140-41, 189, Test. Adelung; Trial Ex. 1, Minutes from Meetings of Nebraska City Area Solid Waste Agency 1996-1999 & Attachment, Interlocal Cooperation Act Agreement Creating the Nebraska City Area Solid Waste Agency.)

3. At least since April of 1997, the Agency and City Council have been continually concerned about a significant drop in tonnage at the Transfer Station due to "so much competition for solid waste." An advisory committee of the Agency suggested that privatization of the Transfer Station could be a solution, but "[w]hatever solution is formulated, the bond payments still have to be made." The committee members stated that "their number one concern would be to rent the [transfer station] for at least the amount of the bond payments." (Trial Ex. 1(B), Agency Minutes of Apr. 21, 1997, at 1 & 3-4; Trial Ex. 1(F), Agency Minutes of Nov. 17, 1997, at 1 ("The answer to making the transfer station financially sound is to increase volume."); Trial Ex. 1(H),

Agency Minutes of July 28, 1998, at 1-2 ("Mr. Clyde Stoll, Otoe County Commissioner, stated that the only savings the City would experience by closing the transfer station would be the $10,000 operating expenses as the bond payment and the minimum tonnage requirements are ongoing. The solution is to get the tonnage back. He suggested that the haulers sign a commitment to bring their trash to the transfer station."); Trial Ex. 2(D), City Council Minutes of Feb. 11, 2000, at 1 ("Commissioner Stark stated that we are having problems now because haulers committed to bring tonnage to our transfer station and we contracted with a landfill based on those commitments. Now the haulers are not bringing the solid waste as they had committed, leaving the transfer station in a precarious financial position.").)

4. On or about February 11, 2000, Nebraska City's City Council conducted a special session for the purpose of hearing from prospective bidders and to approve the issuance of a Request for Proposals ("RFP") from bidders seeking an exclusive five-year Franchise Agreement for solid waste disposal collection services within the corporate limits of Nebraska City. On February 14, 2000, Nebraska City issued the RFP. The RFP repeatedly stated Nebraska City's specification that during the first year (April 1, 2000, to March 31, 2001) of the exclusive Franchise Agreement, the contractor "will agree . . . to deliver to the Nebraska City Area Solid Waste Agency Transfer Station all solid waste collected within the City Limits and destined for landfill disposal subject to the currently applicable tipping fees," as well as "[a]ll recyclables that are designated by the City and collected from the bins or otherwise from within the City." (Trial

Ex. 4, Request for Proposals ¶ 3, Proposal Requirements ¶¶ 5 & 7, Consideration of Proposals ¶¶ 6-7.)

5. With regard to the RFP specification that waste be delivered to the Nebraska City Area Solid Waste Agency Transfer Station, Mayor Adelung testified that:

> [D]uring this time period, we had haulers who, for one reason or another throughout this time period, began diverting their trash elsewhere. They're collecting trash and they're taking it elsewhere. The City was—My take on this is that personally and the City was concerned about the good faith efforts of who we were going to be entering into an agreement with for doing the collection because there was just kind of a lot of—I don't know if game playing is a good term to use that was going on. And so what I'm reading into this is that it was more that we were looking at good faith, that if you're going to—if we are even going to consider you having a franchise agreement to collect all of our solid waste in the City of Nebraska City, that you need to show some good faith, if you aren't collecting it now, that you would bring your trash to the transfer station as a good faith effort.
>
> . . . .
>
> You know, certainly as a council member or a mayor, we did want the tonnage on February 14th, 2000 [the date the RFP was issued].

(Tr. 198-99 & 202, Test. Adelung.)

6. The RFP also provided that from April 1, 2001, to March 31, 2005, the contractor "shall provide for disposal at a licensed Subtitle D landfill selected by and specified by the Contractor," during which time the contractor "shall agree to pay the City a minimum franchise fee of $7,500 per month commencing April 1, 2001, and continuing for the duration of the agreement." (Trial Ex. 4, Request for Proposals ¶ 3; Proposal Requirements ¶ 6.) The RFP gave applicants the option of submitting a separate proposal for lease or purchase of the Nebraska City Area Solid Waste Agency Transfer Station from April 1, 2001, to March 31, 2005. (Trial Ex. 4, Request for Proposals ¶ 4.)

7. Three companies replied to the RFP—intervenor Waste Connections[2] of Nebraska, Inc., Deffenbaugh Industries, Inc., and Brian Kelly—all of which were from a state other than Nebraska. On March 2, 2000, the City Council for Nebraska City met with representatives from these companies to discuss their proposals. (Filing 53, Order on Pretrial Conf. ¶¶ A(4)-(7).)

8. On March 21, 2000, Nebraska City Mayor Jo Dee Adelung and the City Council for Nebraska City convened jointly with the Nebraska City Area Solid Waste Agency to analyze the

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[2] Waste Connections is often referred to as "Omega Systems, Inc." in the record. As indicated by the case caption, Omega also does business as Waste Connections of Nebraska, Inc. (Tr. 120, Test. Adelung.)

franchise proposals the City had received. (Trial Ex. 2(F), at 189-190.) The minutes of that meeting summarize the City's interests in granting an exclusive franchise agreement: "1) making the solid waste bond payment, 2) local rates ideally remaining the same, 3) minimizing operating costs, 4) local place for yard waste, 5) satisfying contract with Hamm's Quarries.[3]" (Trial Ex. 2(F), at 189; Tr. 121-23, 166-67 (Test. Adelung stating City's interests were accurately stated in minutes), 174-76.) During that meeting, John Heil, attorney for the City and the Agency, advised the City Council and Agency that franchising waste collection within Nebraska City and leasing the Transfer Station would be in the City's best interest because it would remove Nebraska City from the garbage business and provide certainty of citizen rates. "The franchise fee and the lease fee that comes closest to meeting the bond payments [on the transfer station] is the best offer. Obviously the more waste that comes into the transfer station, the better the chances of meeting the required payments. The Commissioners propose to move away from financing the bond payments through taxes and make the [transfer] station self-sufficient." Attorney Heil was directed to negotiate a lease and franchise agreement with applicant Waste Connections. (Trial Ex. 2(F), at 190 ¶¶ 3 & 6.)

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[3] Scattered references throughout the record indicate that the Nebraska City Area Solid Waste Agency had a contract with a landfill in Kansas called Hamm's Quarry that required the Agency, through its Transfer Station, to deliver a certain minimum tonnage each month, and failure to do so resulted in a financial penalty. (See generally Trial Ex. 19, Dep. James Stark; Tr. 36-37).

9. The Agency, in deciding whether to lease the Transfer Station to the exclusive franchisee, considered several factors: the Agency would no longer be responsible for staffing the Transfer Station; the Agency would no longer purchase equipment to operate the facility; the Agency could focus on other aspects of the solid waste management plan, including recycling, yard waste, and composting; and the health and welfare of Nebraska City citizens. (Tr. 256-57, Test. Patrick Haverty.)

10. At another joint meeting between Nebraska City's City Council and the Agency on June 28, 2000, attorney Heil advised[4] the Council and Agency that a franchise agreement and lease would require refinancing of solid waste revenue bonds to taxable bonds, with an estimated monthly obligation of $14,000. The proposed draft Franchise and Lease Agreement each provided for a $7,000 monthly payment. "The lease, which is subject to the franchise agreement, is a seven[-]year lease with a seven[-]year renewal option. This matches the fourteen[-]year bond repayment schedule." (Trial Ex. 2(G), at 263 ¶ 3.)

11. On July 20, 2000, Nebraska City's City Council passed and approved City Ordinance No. 2505-2000 (the "Ordinance"), which awarded to intervening defendant Waste Connections an exclusive franchise for waste collection within the corporate limits of Nebraska City. (Filing 53, Order on

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[4] Mr. Heil advised the Agency as early as 1997 that the Transfer Station could not be leased to a private company without jeopardizing the tax-exempt status of the bonds. (Trial Ex. 1(E), Agency Minutes of Nov. 5, 1997, at 1.)

Pretrial Conf. ¶¶ A(8); Trial Ex. 6.) Section 9 of the Ordinance provides as follows:

> The Mayor and Board of Commissioners of the City of Nebraska City, Nebraska, (the "City") hereby finds and determines that in view of the City's undertakings with respect to bonds issued by the Nebraska City Area Solid Waste Agency (the "Agency") and in order to provide for the orderly and efficient removal of solid waste within the City it is necessary and advisable for the City to enter into a Franchise Agreement with Waste Connections of Nebraska, Inc., a Delaware corporation, ("Waste Connections Nebraska") . . . ; that a Franchise Agreement with Waste Connections Nebraska . . . [has] been prepared and submitted for approval by the Mayor and Board of Commissioners and that it is necessary and advisable that said agreement[] be approved and [its] execution authorized.

Section 11 of the Ordinance provides: "Waste Connections of Nebraska, Inc., a Delaware corporation, is the exclusive franchisee of the City of Nebraska City for the collection and disposal of garbage, rubbish, trash or waste. It shall be unlawful for any other person to haul or collect for hire any garbage, rubbish, trash or waste for others in the city."

12. On August 30, 2000, the City and Waste Connections entered into a Franchise Agreement pursuant to the terms of the

Ordinance. (Filing 53, Order on Pretrial Conf. ¶¶ A(9); Trial Ex. 7.) The preamble to the Agreement expresses the City's "desire . . . to contract with an independent contractor to provide for the operation of its municipal solid waste collection system in order that the public health and safety of the citizens of the City may be protected and preserved"; the fact that the City's solid waste collection system involves the collection and removal of recyclables and waste[5] within the City limits and the use of a Transfer Station for receipt and transfer of such waste; the City's willingness to grant Waste Connections "an exclusive franchise for the collection and removal of recyclable[s] . . . and [waste] from the residences and businesses located in the City as part of an agreement for the operation of the municipal waste collection system"; and that Waste Connections would enter "into a Lease Agreement with the Nebraska City Area Solid Waste Agency for exclusive use of the Transfer Station for a term coterminous with this Agreement." (Trial Ex. 7, at 1.)

13. The Franchise Agreement provides that Waste Connections "shall utilize a licensed subtitle D landfill disposal facility, in which Municipal Solid Waste collected from within the City limits shall be deposited." (Trial Ex. 7 ¶ 8.) The City has agreed not to license or grant permits to any other waste or recyclable collector within City limits during the term of the Agreement, and Waste Connections has agreed to accept and

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[5] The Agreement contains separate definitions for garbage, rubbish, refuse, junk, and recyclable materials. I shall collectively refer to these items as "waste."

process recyclables and waste at the Nebraska City Transfer Station pursuant to the terms of a separate Lease Agreement with the Nebraska City Area Solid Waste Agency. (Trial Ex. 7 ¶¶ 10 & 12.)

14. The term of the Franchise Agreement is seven years, during which Waste Connections must pay the City a franchise fee of $588,000, or monthly installments of $7,000. Waste Connections may renew the Agreement for one additional seven-year term, provided that Waste Connections also renews its Transfer Station Lease Agreement with the Nebraska City Area Solid Waste Agency for an additional seven years. (Trial Ex. 7 ¶¶ 9 & 19.)

15. Also on August 30, 2000, the Nebraska City Area Solid Waste Agency and Waste Connections of Nebraska, Inc., entered into the Lease referred to in the Franchise Agreement, allowing Waste Connections to lease the property on which the Transfer Station sits for seven years, during which Waste Connections must pay the Agency $588,000, or monthly installments of $7,000. Waste Connections may renew the Lease for one additional seven-year term, provided that Waste Connections also renews its Franchise Agreement with Nebraska City for an additional seven years. (Trial Ex. 8 ¶¶ 2, 4-5, 31.)

16. At the time the Franchise and Lease Agreements were entered into with Waste Connections, Mayor Adelung and City Finance Commissioner Patrick Haverty—who were both members of the City Council and the Solid Waste

Agency—believed that if the Agency could not pay the bonds, the City would be financially responsible. (Tr. 191, Test. Adelung; Tr. 268, Test. Haverty.)

17. While the RFP stated that the City was seeking proposals from qualified firms who, within the initial 12 months of the Franchise Agreement, would agree to take all waste collected in Nebraska City to the Nebraska City Area Solid Waste Agency Transfer Station, this requirement was never included in the Franchise Agreement and Lease with Waste Connections. (Trial Exs. 7 & 8; Tr. 206, Test. Adelung.)

18. In February, 2002, plaintiff Barker Sanitation began providing services to customers within Nebraska City. On May 9, 2002, Barker Sanitation received a letter from Nebraska City's legal counsel notifying Barker that it was violating the Ordinance and the Franchise Agreement. The letter warned that violation of the Ordinance could result in criminal fines or confinement and that each day such violation continued would constitute a separate and distinct offense. The City's legal counsel warned Barker Sanitation to cease and desist immediately, as the City intended to enforce the terms of the Ordinance. (Filing 53, Order on Pretrial Conf. ¶ A(10); Trial Ex. 9.)

19. Barker Sanitation's counsel responded to the City's cease-and-desist letter with a September 25, 2002, letter that characterized the City's ordinance as "improper flow control" which violates "the dormant provisions of the Interstate Commerce Clause." (Trial Ex. 12.) In a October 7, 2002, City Council meeting at which Barker's letter was addressed, Mayor

Adelung stated:

> It was probably pertinent and important that maybe it's time that we go back to the citizens and explain one more time why we're in the position we are and the reason for the cost of the fees being as high as they are is because they have the bond payments, have to make the bond payments, and that the fee structure and the agreement for the lease fixed that, I mean, it was exact amount. We know what payment to the bonds are. That's why we are paying what we are paying for the garbage rates.

(Tr. 184-85, Test. Adelung.)

20. On other occasions in the past two years, Nebraska City Mayor Adelung has explained to citizens the reason for the exclusive Franchise Agreement and Transfer Station Lease:

> A . . . I have talked on several occasions on the radio and everywhere else about that fact that we weren't generating enough revenue to provide the solid waste facility and our solid waste program for the City of Nebraska City and that included the bond payments.
>
> Q And so you were expressing to the citizens that it was an economic issue, correct?
>
> A That is correct.

Q And that instead of going to taxes and taxing the citizens, this was a better option of assessing and—or providing the franchise agreement, correct?

A That is correct.

Q And that was to protect the economic interest of Nebraska City, correct?

A That is correct.

(Tr. 139:9-140:6, Test. Adelung.)

21. Not all waste collected in Nebraska City pursuant to the exclusive Franchise Agreement goes to the Transfer Station for processing—for instance, Waste Connections takes three rolloff container loads per week from a meatpacking plant directly to a Subtitle D landfill in Nebraska instead of to the Transfer Station first. Logistical issues have also caused Waste Connections to dump residential waste at other Subtitle D facilities, instead of at the Transfer Station in Nebraska City. Of the waste collected at the Nebraska City Transfer Station, Waste Connections routinely delivers some percent of it to the Mills County or Loess Hills Landfill in Iowa. (Tr.272-73 & 285, Test. Scott Blanford (11 percent went to Iowa landfill during month of trial).)

II. CONCLUSIONS OF LAW

The Commerce Clause allows Congress to regulate

interstate commerce, U.S. Const. art. I, § 8, cl. 3, while the so-called dormant Commerce Clause "is the negative implication of the Commerce Clause: states may not enact laws that discriminate against or unduly burden interstate commerce." South Dakota Farm Bureau, Inc. v. Hazeltine, 340 F.3d 583, 592 (8th Cir. 2003) (state constitutional provision that prohibited corporations and syndicates, subject to certain exemptions, from acquiring or obtaining interest in land used for farming and from otherwise engaging in farming violated dormant Commerce Clause). Recognition of the dormant Commerce Clause "carries out 'the Framers' purpose to preven[t] a State from retreating into economic isolation or jeopardizing the welfare of the Nation as a whole, as it would do if it were free to place burdens on the flow of commerce across its borders that commerce wholly within those borders would not bear.'" Id. at 593 (quoting Fulton Corp. v. Faulkner, 516 U.S. 325, 330-31 (1996)) (additional internal quotation marks omitted).

In order to determine whether a law violates the dormant Commerce Clause, the court must first consider whether the law discriminates against interstate commerce. In this context, discrimination means "'differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter.'" Id. (quoting Oregon Waste Sys., Inc. v. Dep't of Envtl. Quality, 511 U.S. 93, 99 (1994)). "The central rationale for the rule against discrimination is to prohibit state or municipal laws whose object is local economic protectionism, laws that would excite those jealousies and retaliatory measures the Constitution was designed to prevent." C & A Carbone, Inc. v. Town of Clarkstown, 511 U.S. 383, 390 (1994).

A statute will be held to discriminate against out-of-state interests if it is discriminatory "on its face, in its purpose, or through its effects," R & M Oil & Supply, Inc. v. Saunders, 307 F.3d 731, 734 (8th Cir. 2002):

> First, discrimination can be discerned where the evidence in the record demonstrates that the law has a discriminatory purpose. Alternatively, a law could facially discriminate against out-of-state interests. Third, even if a state law responds to legitimate local concerns and is not discriminatory either in its purpose or on its face, the law could discriminate arbitrarily against interstate commerce, that is, it could have a discriminatory effect.

Hazeltine, 340 F.3d at 593 (internal citations omitted). If the law is found to be discriminatory in either of these three ways, it is per se invalid unless the defendant municipality "can demonstrate, under rigorous scrutiny, that it has no other means to advance a legitimate local interest." Id.; C & A Carbone, 511 U.S. at 392. This rigorous scrutiny does not refer to the strength of the interests furthered by the challenged law, but "whether reasonable non-discriminatory alternatives exist to advance the interests. The Defendants bear the burden of demonstrating there is no such alternative." Hazeltine, 340 F.3d at 597. See also U & I Sanitation v. City of Columbus, 205 F.3d 1063, 1068 (8th Cir. 2000) (if ordinance is discriminatory on its face or in its purpose or effects, city faces heavy burden of proof; ordinance presumed invalid unless city can demonstrate that ordinance serves some

legitimate purpose unrelated to limiting interstate commerce and that ordinance is only possible way to achieve such purpose).

If the challenged law is not discriminatory on its face or in its purpose or effects, the court may nevertheless strike down the law "if the burden it imposes on interstate commerce 'is clearly excessive in relation to the putative local benefits.'" Id. at 593 (quoting Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1994)). If this so-called "Pike balancing test" is applied, the court should consider the nature of the local interest involved and whether such interest "'could be promoted as well with a lesser impact on interstate activities.'" R & M Oil, 307 F.3d at 735 (quoting Pike, 511 U.S. at 142). The court should look not only at the burden imposed by the statute on the individual plaintiff, but at the "cumulative effects" of the statute—in this case, the effect of Nebraska City's exclusive franchise Ordinance and agreement on all waste haulers and processors and the interstate effect on the waste-hauling and waste processing market if several jurisdictions were to enact similar ordinances. R & M Oil, 307 F.3d at 736. See also U & I Sanitation, 205 F.3d at 1069 (applying Pike and adopting aggregate analysis to consider interstate effect on recyclables market if several jurisdictions adopted similar ordinances).

In dormant Commerce Clause analysis, "[t]he crucial inquiry is whether the regulation at issue 'is basically a protectionist measure or whether it can fairly be viewed as a law directed to legitimate local concerns, with effects upon interstate commerce that are only incidental.'" Waste Systems Corp. v. County of Martin, 985 F.2d 1381, 1385 (8th Cir. 1993) (quoting

City of Philadelphia v. New Jersey, 437 U.S. 617, 624 (1978)).

A. Facial Discrimination Against Out-of-State Interests

Because there is no language in City Ordinance No. 2505-2000 (or the Franchise Agreement and Lease entered into pursuant to such provision) that discriminates against out-of-state interests, Plaintiff has failed to prove facial discrimination.

B. Discrimination Against Out-of-State Interests in Effect

Plaintiff Barker argues that the effect of the "flow-control scheme" created by the Ordinance, Franchise Agreement, and Lease "require[s] local processing of waste at the cost of interstate commerce regardless of where the garbage eventually ends in a landfill." (Filing 82, Pl.'s Reply Br. at 11.) Citing City Council minutes and other evidence indicating that the pricing of the Franchise Agreement and Lease were tied to the debt obligation of the City for construction of the Transfer Station, Plaintiff asserts that "[t]he economic reality of the sweetheart deal between Nebraska City and Waste Connections of Nebraska, Inc. is that the solid waste collected in Nebraska City must be processed locally." (Filing 77, Pl.'s Post Tr. Br. at 15.) "It would not make economic sense to pay $7,000 a month lease for the transfer station and then pay tipping fees somewhere else for the same garbage." (Id. at 15-16.)

Insofar as Barker asserts that the Ordinance has a

discriminatory effect on interstate commerce, I am not persuaded. The evidence establishes that the Ordinance, Franchise Agreement, and Lease do not require Waste Connections—the winner of the exclusive franchise bid—or any self-hauler to deliver waste collected in Nebraska City to the Transfer Station or to any other designated facility, in-state or out-of-state. To the contrary, the Franchise Agreement only requires Waste Connections to "utilize a licensed subtitle D landfill disposal facility[] in which Municipal Solid Waste collected from within the City limits shall be deposited." (Trial Ex. 7 ¶ 8.)

Further, the evidence at trial establishes that Waste Connections takes three rolloff container loads per week from a Nebraska City meatpacking plant directly to a Subtitle D landfill in Nebraska instead of first taking them to Nebraska City's Transfer Station; logistical considerations have caused Waste Connections to deliver residential waste directly to Subtitle D facilities, instead of to the Transfer Station in Nebraska City; and some percentage of the waste collected at the Nebraska City Transfer Station is routinely delivered to the Mills County or Loess Hills Landfill in Iowa. (Tr. 272-73 & 285, Test. Scott Blanford (11 percent went to Iowa landfill during month of trial).)

Because Barker has failed to prove that the Ordinance (and the documents entered into pursuant thereto) actually deprive out-of-state waste processors and collection facilities access to the Nebraska market, or that the Ordinance and associated agreements benefit in-state waste haulers, processors, and collection facilities at the expense of similar out-of-state

entities, I find that the Ordinance does not have a discriminatory effect against interstate commerce[6]. See Exxon Corp. v. Governor of Maryland, 437 U.S. 117, 127-28 (1978) ("the [Commerce] Clause protects the interstate market, not particular interstate firms, from prohibitive or burdensome regulations."); U & I Sanitation, 205 F.3d at 1069 (ordinance requiring haulers to bring city's waste that was destined for in-state disposal to city's transfer station did "not explicitly favor a local interest over out-of-state interests," so did not "overtly violate the Commerce Clause."); Ben Oehrleins & Sons & Daughter, Inc. v. Hennepin County, 115 F.3d 1372, 1385 (8th Cir. 1997) (ordinance requiring delivery of county waste destined for in-state disposal to county-designated transfer stations or processing facilities not discriminatory under dormant Commerce Clause because ordinance did not give preferential treatment to local processors and facilities as compared with out-of-state facilities; "This may create a monopoly at the local level, but as long as waste is allowed to flow freely in or out of the state, this does not constitute discrimination against interstate commerce.").

C. Purpose of Discrimination Against Out-of-State Interests

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[6] To the extent Barker's argument is that the Ordinance adversely affected its ability to do business in Nebraska City by virtue of the exclusive Franchise Agreement that was awarded another company, I previously concluded that Barker lacks standing to challenge the award of the exclusive franchise to Waste Connections under the dormant Commerce Clause. (Filing 64.)

Barker next argues that the Ordinance and associated agreements had a discriminatory purpose within the meaning of the dormant Commerce Clause—that is, "to ensure that enough revenue was generated for Nebraska City to pay the bond payments and operation expenses of the transfer station" by "hoarding solid waste to the local transfer station and preventing out[-]of[-]state competition from servicing waste generated in Nebraska City." (Filing 77, Pl.'s Post Tr. Br. at 6 & 10.) Characterizing the Ordinance as a protectionist "financing measure," Plaintiff cites evidence demonstrating Nebraska City's long-term problem with maintaining the financial viability of its Transfer Station in the face of decreased tonnage. (Id. at 1 & 7-10.)

The plaintiff has the burden of proving discriminatory purpose, and can rely on direct and indirect evidence to establish that Nebraska City intended to discriminate against out-of-state business when it enacted the Ordinance. Hazeltine, 340 F.3d at 593-96 (analyzing whether state constitutional amendment had discriminatory purpose under dormant Commerce Clause and relying on statements distributed to voters, notes from drafting meetings, memoranda, irregularities in drafting process, and lack of evidence that amendment would further stated purpose); SDDS, Inc. v. State of South Dakota, 47 F.3d 263, 268-70 (8th Cir. 1995) (in finding discriminatory purpose for referendum, court relied on direct and indirect evidence, including legislative history, state-sponsored pamphlet that accompanied referendum, and lack of evidence that referendum furthered state's ostensible purpose).

While there is much evidence that the motivation behind the Ordinance, Franchise Agreement, and Lease was to guarantee the financial well-being of Nebraska City's Transfer Station which would, in turn, protect the economic interest of Nebraska City, "this fact does not demonstrate a motive to discriminate against out-of-state interests, who remain free to process [Nebraska City] waste should a hauler[7] wish to transport it across state lines." U & I Sanitation, 205 F.2d at 1068 n.2 (emphasis in original). I agree that the Ordinance and its associated agreements are structured to encourage (but not require) Nebraska City's waste to be deposited at its local Transfer Station. This may well be "local economic protectionism," as Plaintiff argues, but "its constitutionality will be governed by its effects upon interstate, not local, commerce." Id.

There is no evidence that the purpose behind the Ordinance and associated Franchise Agreement and Lease was to hinder the export of in-state waste into other states or to prevent out-of-state waste processors or haulers from doing business in Nebraska. See generally C & A Carbone, Inc., 511 U.S. at 389-94; Hazeltine, 340 F.3d at 593-96; SDDS, Inc., 47 F.3d at 268-71. In short, there is no evidence that Nebraska City's purpose in enacting the Ordinance was to treat in-state and out-of-state economic interests differently, thereby benefitting in-state economic interests and burdening out-of-state economic interests. Hazeltine, 340 F.3d at 593.

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[7] In this case, the "hauler" would be Waste Connections or individual self-haulers.

Because the Ordinance and its associated agreements are not discriminatory on their face, in their purpose, or in their effects, I cannot conclude that the Ordinance discriminates against interstate commerce within the meaning of the dormant Commerce Clause.

D. Pike Balancing Test

While the Ordinance and its associated agreements are not discriminatory, I may nevertheless invalidate the law on dormant Commerce Clause grounds if the local interests served by the law do not justify the burden the law imposes upon interstate commerce.

> "Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits."

U & I Sanitation, 205 F.2d at 1069 (quoting Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970)).

1. Local Benefits

First and foremost, the Ordinance, Franchise Agreement, and Lease benefit Nebraska City by ensuring the City's ability to finance its debt on the Transfer Station. While this interest is legitimate, revenue generation alone "'is not a local interest that

can justify discrimination against interstate commerce.'" U & I Sanitation, 205 F.2d at 1070 (considering City's interest in financing debt on landfill as part of Pike analysis) (quoting Carbone, 511 U.S. at 393).[8]

The evidence in this case establishes that several other local interests were discussed by the City Council for Nebraska City and the Nebraska City Area Solid Waste Agency before enacting the Ordinance at issue and before entering into the Franchise Agreement with Waste Connections: obtaining certainty of local garbage collection rates; minimizing operating costs of the Transfer Station; having a local collection point for yard waste; satisfying the City's contract with Hamm's Quarries; removing Nebraska City from the garbage business; relieving the Agency from its duties of staffing the Transfer Station and purchasing equipment to operate the facility; allowing the Agency to focus on other aspects of the solid waste management plan, including recycling, yard waste, and composting; and the health and welfare of Nebraska City citizens. (Trial Ex. 2(F), at 189; Tr. 121-23, 166-67 (Test. Adelung stating City's interests were accurately stated in minutes of Mar. 21, 2000, meeting), 174-76, 256-57(Test. Patrick Haverty).) The Ordinance itself mentions the City's interest in providing for the "orderly and

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[8] Like the Eighth Circuit Court of Appeals in U&I Sanitation, 205 F.2d at 1070 n.5, I "have no occasion to decide whether a local regulation's revenue-generating purpose, without more, could ever justify significant incidental burdens upon interstate commerce under the Pike balancing approach." In this case, there are other local benefits achieved by the Ordinance at issue.

efficient removal of solid waste within the City" and the preamble of the Franchise Agreement refers to protecting and preserving the public health and safety of the City's citizens.

While the great majority of evidence focuses on the City's interest in paying off its bonds, the evidence also shows there are several other local benefits the City hoped to achieve by enacting the Ordinance. Ben Oehrleins & Sons v. Hennepin County, 115 F.3d at 1387 n.15 ("We reject plaintiffs' assertion that . . . the sole goal of Ordinance 12 is to ensure the financial viability of the HERC facility. . . . While we may legitimately balance the County's purported interests against the Ordinance's burden on interstate commerce, we have no authority to instruct the County that those stated interests are not really interests.").

Along with considering the nature of the putative local interests involved, I must also analyze whether these interests "'could be promoted as well with a lesser impact on interstate activities.'" R & M Oil, 307 F.3d at 735 (quoting Pike, 511 U.S. at 142). The only other apparent alternative that would also ensure long-term survival of the Transfer Station is general taxation, although "such an alternative has political implications" and would not further any of the local interests identified by the City and Agency. U & I Sanitation, 205 F.2d at 1071 (city could raise revenue and protect investment in landfill through general taxation). See also Carbone, 511 U.S. at 394 (town could subsidize waste facility through general taxes or municipal bonds).

2. Burden on Interstate Commerce

It is difficult to detect what burden on interstate commerce is imposed by the Ordinance in this case when the Ordinance does not prohibit Waste Connections from taking Nebraska City waste to any in-state or out-of-state transfer facility or landfill (so long as it is a licensed subtitle D landfill disposal facility) and when the Ordinance in no way restricts out-of-state waste from being brought to, and processed in, the Nebraska City Transfer Station. Indeed, the evidence shows that some percent of the waste collected at the Nebraska City Transfer Station is routinely delivered to an Iowa landfill, and not all waste collected in Nebraska City pursuant to the exclusive Franchise Agreement goes to the Transfer Station for processing. (Tr. 272- 73 & 285, Test. Scott Blanford (11 percent of Transfer Station waste went to Iowa landfill during month of trial; Waste Connections takes three rolloff container loads per week from meatpacking plant directly to Subtitle D landfill in Nebraska instead of to Transfer Station first; logistical issues cause Waste Connections to dump residential waste at other Subtitle D facilities, instead of at Nebraska City Transfer Station).)

In assessing the burden on interstate commerce imposed by the Ordinance and the agreements entered into pursuant to its terms, "our analysis is not limited to the burdens suffered by the particular parties before us. Rather, we must adopt an aggregate analysis whereby we consider the interstate effect on the . . . market if several jurisdictions were to adopt similar ordinances." U & I Sanitation, 205 F.2d at 1069. Assuming, as I am required to do, that the nation's small cities enacted exclusive franchise ordinances for solid waste collection—without requiring the

exclusive franchisee to deliver collected waste to any particular in-state or out-of-state facility and without prohibiting out-of-state waste processors and collection facilities from accessing the relevant state's market—I cannot conclude that the burden on interstate commerce would be any more than incidental.

3. Benefits and Burdens Weighed

In light of the numerous local benefits that would be achieved by Nebraska City's Ordinance (and the Franchise Agreement and Lease entered into pursuant to the Ordinance) and the incidental burden the Ordinance and associated agreements impose upon interstate commerce, I must conclude that the defendant has not violated the dormant Commerce Clause in enacting the exclusive franchise Ordinance under Pike.

III. CONCLUSION

Nebraska City's exclusive franchise Ordinance for solid waste collection and the exclusive franchise agreement between Nebraska City and Waste Connections entered into pursuant to the terms of the Ordinance do not violate the dormant Commerce Clause.

IT IS ORDERED:

1. Nebraska City, Nebraska, Ordinance No. 2505-2000 and the exclusive franchise agreement between Nebraska City, Nebraska, and intervenor defendant Waste Connections of Nebraska, Inc., entered into pursuant to the terms of Ordinance No. 2505-2000

do not violate the dormant Commerce Clause;

2. Judgment in favor of Defendant and Intervenor Defendant and against Plaintiff shall be entered by separate document; and

3. This case is dismissed with prejudice.

DATED this 4th day of November, 2003.
BY THE COURT:
s/Richard G. Kopf
United States District Judge

ATTACHMENT A

City of Nebraska City Ordinance 2505-2000

AN ORDINANCE TO REPEAL SECTION 17-7 OF THE CITY CODE OF NEBRASKA CITY, NEBRASKA, RELATING TO ESTABLISHMENT OF A LANDFILL; TO AMEND SECTION 17-19 OF THE CITY CODE OF NEBRASKA CITY, NEBRASKA, RELATING TO GARBAGE CONTAINERS REQUIRED; TO REPEAL SECTIONS 17-20 AND 17-21 OF THE CITY CODE OF NEBRASKA CITY, NEBRASKA RELATING TO CONTAINERS FOR RUBBISH AND WASTE AND THE SEPARATION OF GARBAGE; TO AMEND SECTIONS 17-22, 17-23, AND 17-24 OF THE CITY CODE OF NEBRASKA CITY, NEBRASKA, RELATING TO THE PROTECTION, LOCATION AND MAINTENANCE OF GARBAGE CONTAINERS; TO AMEND SECTION 17-25 OF THE CITY CODE OF NEBRASKA CITY, NEBRASKA, RELATING TO CONVEYANCES; TO ADOPT SECTION 17-26 OF THE CITY CODE OF NEBRASKA CITY, NEBRASKA, RELATING TO DISPOSAL REQUIREMENTS; TO APPROVE A FRANCHISE AGREEMENT BETWEEN THE CITY OF NEBRASKA CITY AND WASTE CONNECTIONS OF NEBRASKA, INC., RELATING TO COLLECTION AND DISPOSAL OF SOLID WASTE WITHIN THE CORPORATE LIMITS OF THE CITY;

TO APPROVE THE RELATED GUARANTEE AND AUTHORIZING THE EXECUTION AND DELIVERY OF SUCH FRANCHISE AGREEMENT BY OFFICERS OF THE CITY AND ACCEPTANCE OF SUCH GUARANTEE; TO ADOPT SECTION 17-43 OF THE CITY CODE OF NEBRASKA CITY, NEBRASKA, RELATING TO FRANCHISED COLLECTION; TO REPEAL SECTIONS 17-36, 17-37, 17-38, 17-39, 17-40, 17-41 AND 17-42 OF THE CITY CODE OF NEBRASKA CITY, NEBRASKA, PERTAINING TO COLLECTORS' PERMITS; AND TO PROVIDE FOR PUBLICATION AND AN EFFECTIVE DATE.

BE IT ORDAINED BY THE MAYOR AND COUNCIL OF THE CITY OF NEBRASKA CITY, NEBRASKA:

SECTION 1. That Section 17-7 of the Code of the City of Nebraska City, Nebraska, be and the same is hereby repealed.

SECTION 2. That Section 17-19 of the Code of the City of Nebraska City, Nebraska, is hereby amended to read as follows:

Section 17-19. Containers required.

It shall be the duty of every person owning, managing, operating, leasing, renting or occupying any premises, or any place where garbage, rubbish, trash or waste accumulates, in the

city, to obtain a container from the City's franchised waste collection contractor or to provide a portable, flyproof and leakproof garbage container, with a capacity of not more than thirty (30) gallons constructed of suitable material, with an airtight and properly fitting cover. The daily accumulation of garbage, rubbish, trash and waste shall be placed in such container.

SECTION 3. That Sections 17-20 and 17-21 of the Code of the City of Nebraska City, Nebraska, be and the same are hereby repealed.

SECTION 4. That Section 17-22 of the Code of the City of Nebraska City, Nebraska, is hereby amended to read as follows:

Section 17-22. Protection of contents of containers.

Garbage containers shall be kept closed tightly except during the collection and deposit of garbage, rubbish, trash or waste. The contents of all garbage containers shall be protected so that the wind cannot blow out and scatter the same over the streets, alleys and premises of the city.

SECTION 5. That Section 17-23 of the Code of the City of Nebraska City, Nebraska, is hereby amended to read as follows:

Section 17-23. Location of containers.

The containers required by this article shall be kept in the

rear of the premises or in some other unobtrusive location. Containers shall be placed at a separate designated location for collection only on the days collection is scheduled.

SECTION 6. That Section 17-24 of the Code of the City of Nebraska City, Nebraska, is hereby amended to read as follows:

Section 17-24. Maintenance of containers.

Every container required by this article shall be maintained in as sanitary condition as possible in view of the use to which it is put; and shall be thoroughly cleansed as needed.

SECTION 7. That Section 17-25 of the Code of the City of Nebraska City, Nebraska, is hereby amended to read as follows:

Section 17-25. Conveyances.

No person shall carry, haul or convey any garbage, rubbish, trash or waste through the streets, alleys or public places of the city, except in such a manner that non of its contents shall be spilled or strewn over, on or along such street, alley or public place. Garbage, rubbish, trash or waste shall not be held in conveyances overnight.

No person shall carry, haul or convey any garbage, rubbish, trash or waste in any vehicle unless the same shall be completely enclosed, except during the act of filling and emptying; shall be watertight; shall be equipped with a fire

extinguisher; and shall be cleaned and disinfected with sufficient frequency so as not to cause offense to the eye or nose.

SECTION 8. That Section 17-26 of the Code of the City of Nebraska City, Nebraska is hereby adopted to read as follows:

Section 17-26. Required disposal.

It shall be the duty of every person owning, managing, operating, leasing, renting or occupying any premises, or any place where garbage, rubbish, trash or waste accumulates, in the city, to dispose of the same on at least a weekly basis. Disposal may be accomplished by contracting with the City's franchised waste collection contractor for collection and disposal, by delivery to the City's Transfer Station during the Station's posted regular operating hours accompanied by payment of the applicable fee under the Transfer Station's Gate Rate Schedule, or by any other means of disposal that complies with all applicable provisions of this Code, state law and regulation, and federal law and regulation.

SECTION 9. The Mayor and Board of Commissioners of the City of Nebraska City, Nebraska, (the "City") hereby finds and determines that in view of the City's undertakings with respect to bonds issued by the Nebraska City Area Solid Waste Agency (the "Agency") and in order to provide for the orderly and efficient removal of solid waste within the City it is necessary and advisable for the City to enter into a Franchise Agreement with Waste Connections of Nebraska, Inc., a Delaware corporation, ("Waste Connections Nebraska") with

payment and performance to be guaranteed by Waste Connection, Inc. also a Delaware Corporation, ("Waste Connections"); that a Franchise Agreement with Waste Connections Nebraska and a Guarantee Agreement with Waste Connections for such purposes have been prepared and submitted for approval by the Mayor and Board of Commissioners and that it is necessary and advisable that said agreements be approved and their execution authorized.

SECTION 10. The Mayor (or in the Mayor's absence the vice president of the council) is hereby authorized to execute for and on behalf of the City the Franchise Agreement and to execute acceptance of the Guarantee Agreement in substantially the forms presented but with any such changes as such executing officer shall deem appropriate for and on behalf of the City, subject to approval of the final forms of said agreement by the City Attorney. Whenever appropriate or required, the City Clerk-Treasurer is hereby authorized to attest the executing signature upon any of said agreements.

SECTION 11. That Section 17-43 of the Code of the City of Nebraska City, Nebraska, is hereby adopted to read as follows:

Section 17-43. Exclusive Franchise.

Waste Connections of Nebraska, Inc., a Delaware corporation, is the exclusive franchisee of the City of Nebraska City for the collection and disposal of garbage, rubbish, trash or waste for others in the city.

SECTION 12. That Sections 17-36, 17-37, 17-38, 17-39,

17-40, 17-41 and 17-42 of the Code of the City of Nebraska City, Nebraska, be and the same are hereby repealed.

SECTION 13. This ordinance shall take effect and be in force from and after its passage, approval and publication as provided by law.

PASSED AND APPROVED this 20th day of July, 2000.

s/ Tim Hall
Mayor

ATTEST:
s/ Kay Dammast
City Clerk -Treasurer

Seal Nebraska City,
Otoe County, Nebraska

(2)

Supreme Court, U.S.
FILED
OCT 21 2004
OFFICE OF THE CLERK

No. 04-407

In The

Supreme Court of the United States

BARKER SANITATION,

Petitioner,

v.

CITY OF NEBRASKA CITY, NEBRASKA and WASTE CONNECTIONS OF NEBRASKA, INC.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF FOR RESPONDENT, WASTE CONNECTIONS OF NEBRASKA, INC., IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Court of Appeals properly affirmed the District Court's holding that Nebraska City Ordinance 2505-2000 did not violate the Dormant Commerce Clause.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioner Barker Sanitation was the plaintiff/appellant in the court below. Respondent City of Nebraska City, Nebraska was the defendant/appellee in the court below. Respondent Waste Connections of Nebraska, Inc. was the intervenor defendant/appellee in the court below.

Waste Connections of Nebraska, Inc. is a wholly-owned subsidiary of Waste Connections, Inc. Waste Connections, Inc. is traded publicly on the New York Stock Exchange with the symbol "WCN".

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OPINIONS BELOW

The Opinion of the Eighth Circuit is unreported and reproduced in the Petitioner's Appendix at 1a. The Opinion of the District Court for the District of Nebraska is unreported and reproduced in the Petitioner's Appendix at 4a.

JURISDICTION

The Judgment of the Eighth Circuit was entered on June 25, 2004. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

1. THE DISTRICT COURT PROCEEDINGS.

Barker Sanitation, LLC (hereinafter "Barker Sanitation") filed suit against the City of Nebraska City alleging that the City's Ordinance 2502-2000 violated the dormant provisions of the Commerce Clause, Article I, § 8, Clause 3 of the United States Constitution and caused a taking of Barker Sanitation's property rights in violation of the Fifth Amendment to the United States Constitution and Article I, § 21 of the Nebraska Constitution. Ordinance 2505 incorporated a Franchise Agreement between the City of Nebraska City and Waste Connections of Nebraska, Inc., a Delaware corporation (hereinafter "Waste Connections"). Waste Connections intervened in the litigation aligned as a Defendant.

On July 8, 2003, the United States District Court for the District of Nebraska, the Honorable Richard G. Kopf

entered a Memorandum and Order dismissing Barker Sanitation's takings claim under the United States Constitution and the Nebraska Constitution for lack of standing. The Memorandum and Order also dismissed Barker Sanitation's claim that Nebraska City's decision to award the exclusive franchise to Waste Connections was a violation of the dormant Commerce Clause. The District Court allowed the case to proceed solely on the issue of whether the Franchise Agreement violated the dormant Commerce Clause.

The matter was tried in a one-day trial to the bench on July 25, 2003. On November 4, 2003, the District Court in its Findings of Fact and Conclusions of Law dismissed Barker's Sanitation's Complaint finding that the Ordinance was not discriminatory on its face, in its purpose or in its effects, and thus did not violate the dormant provisions of the Commerce Clause. Pet. App. at 4a-32a. The District Court also found that the Ordinance's burden on interstate commerce was incidental and outweighed by its local benefits. Pet. App. at 4a-32a. A timely appeal followed the entering of the Court's Judgment in accordance with its Findings of Fact and Conclusions of Law.

2. THE EIGHTH CIRCUIT COURT OF APPEALS REVIEW.

The Eighth Circuit Opinion was issued only eight days after oral argument. Pet. App. at 1a-3a. The Eighth Circuit rejected Barker Sanitation's contention that the ordinance discriminates against interstate commerce through its purpose of economic protectionism and through its effect of preventing out-of-state companies from being able to compete with the processing of solid waste in the city. Pet. App. at 3a. The Eighth Circuit also

rejected Barker Sanitation's assertion that the District Court, "[E]rroneously found the ordinance had numerous local benefits, but only incidentally burdened interstate commerce." *Id.* The Eighth Circuit affirmed the District Court's analysis without extended discussion. Pet. App. at 3a. *See*, 8th Cir. R. 47B.

3. MISSTATEMENTS IN PETITIONER'S WRIT OF CERTIORARI.

The Petitioner misstates the clear findings of the District Court as affirmed by the Eighth Circuit. Specifically, Barker Sanitation states, "The District Court found that Nebraska City Ordinance 2505-2000 was admittedly an economic motive." Petitioner's Writ at 8.

The District Court actually held, "The evidence in this case establishes that several other local interests were discussed by the City Council for Nebraska City and the Nebraska City Area Solid Waste Agency before enacting the Ordinance at issue and before entering into the Franchise Agreement with Waste Connections . . ." Petitioner's App. at 28a. The District Court then set forth a list of those local interests. The District Court went on to find that it is, "[D]ifficult to detect what burden on interstate commerce is imposed by the Ordinance . . ." Petitioner's App. at 30a.

The District Court concluded, "In light of the numerous local benefits that would be achieved by Nebraska City's Ordinance (and the Franchise Agreement and Lease entered into pursuant to the Ordinance) and the incidental burden that the Ordinance and associated agreements impose upon interstate commerce, I must conclude that the defendant has not violated the dormant Commerce Clause

in enacting the exclusive franchise ordinance under *Pike*." Petitioner's App. at 31a.

REASONS FOR DENYING THE WRIT

I. BARKER SANITATION LACKS STANDING TO PETITION THE COURT FOR CERTIORARI.

Barker Sanitation lacks standing to petition the court for certiorari. A function of the standing doctrine is to ensure, among other things, that the scarce resources of the federal courts are devoted to those disputes in which the parties have a concrete stake. *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167, 191 (2000). The party invoking the federal jurisdiction bears the burden of establishing case-or-controversy standing requirement. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). The Constitution requires a party to satisfy three elements before it has standing to bring a suit in federal court: injury in fact, causation, and redressability. *Steel Co. v. Citizens for Better Environment*, 523 U.S. 83, 102-103 (1998). This triad of injury in fact, causation and redressability comprises the core of Article Three's case-or-controversy requirement. The party invoking federal jurisdiction bears a burden of establishing its existence. *Id.* at 103-104. In *Steel Co.*, this Court defined redressability as, "[A] likelihood that the requested relief will redress the alleged injury." *Id.* at 103. Relief that does not remedy the injury suffered cannot bootstrap a plaintiff in the federal court; that is the very essence of the redressability requirement. *Id.* at 107.

Barker Sanitation's Petition for Writ of Certiorari fails the redressability prong of the standing test because

Barker Sanitation went out of business after the Eighth Circuit Opinion was issued, according to a letter sent to its customers. Reproduced in Respondent's Appendix is a letter from Barker Sanitation, LLC to "Dear Customer." The letter, in relevant part, states:

> We regret to inform you that as of September 1, 2004, we will no longer be providing residential and commercial sanitation services. We will be dissolving our company due to the fact that we are unable to find dependable employees, plus we have over five thousand dollars on our books of people whom have received service as long as two years ago and are yet to pay for the service we provided. Resp. App. 1a.

Barker Sanitation, LLC, has been dissolved and is out of business. No relief granted by this Court will remedy Barker's alleged injury. Barker Sanitation has simply failed to show that it has standing to pursue its Petition for Writ of Certiorari. The Writ must be denied.

II. THERE IS NO CONFLICT BETWEEN RELEVANT DECISIONS OF THIS COURT AND THE *BARKER SANITATION* DECISION.

Supreme Court Rule No. 10, in relevant part, states:

> A petition for writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers:
>
> * * *
>
> (c) a state court or United States court of appeals has decided an important question of

> federal law that has not been, but should be, settled by this Court, or has decided an important federal question in the way that conflicts with relevant decisions of this Court.

Barker Sanitation posits its review by this Court on the basis that the District Court and Eighth Circuit opinions in *Barker Sanitation* conflict with *C.A. Carbone, Inc. v. Town of Clarkstone*, 511 U.S. 383 (1994) and other decisions of this Court. However, the *Barker Sanitation* decision is not an "important federal question" that conflicts with this Court's existing precedent. Both the District Court and the Eighth Circuit summarily rejected Barker Sanitation's argument concerning *Carbone* and other Commerce Clause cases decided by this Court.

First, the District Court, as affirmed by the Eighth Circuit, found that there is no language in Ordinance 2505-2000 that facially discriminates against interstate commerce. Pet. App. at 22a.

Second, the District Court, as affirmed by the Eighth Circuit, found that Ordinance 2505-2000 does not have a discriminatory effect against out-of-state interests. Importantly, Barker Sanitation fails to recognize this important holding of the District Court, "The evidence establishes that the Ordinance, Franchise Agreement, and Lease do not require that Waste Connections – the winner of the exclusive franchise bid – or any self-hauler to deliver waste collected in Nebraska City to the Transfer Station or to any other designated facility, in-state or out-of-state." Pet. App. at 23a. This holding clearly and unequivocally distinguishes the *Barker Sanitation* case from *Carbone*. The factual basis of this Court's decision in *Carbone*, as Barker Sanitation's Writ recognizes, was that the Town of Clarkston had "adopted a flow control ordinance which

required all nonhazardous solid waste within the town to be deposited at the transfer station." Pet. Writ at 7. Here, the District Court, as affirmed by the Eighth Circuit, found the exact opposite – the Ordinance does not require waste to be deposited at the transfer station. The factual distinction between these two schemes shows that the *Barker Sanitation* decisions do not deviate from this Court's decision in *Carbone*.

Further, Barker Sanitation can point to no discriminatory effect on the interstate market. The District Court cited this Court's decision in *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 127-128 (1978) that, "[T]he [Commerce] Clause protects the interstate market, not particular interstate firms, from prohibitive or burdensome regulations." Pet. App. at 24a. With respect to discriminatory effect, the District Court and Eighth Circuit decisions were carefully guided by this Court's precedent.

Third, the District Court, as affirmed by the Eighth Circuit, found that the Ordinance was not adopted for a discriminatory purpose. Specifically citing *Carbone*, the District Court held, "There is no evidence that the purpose behind the Ordinance and associated Franchise Agreement and Lease were to hinder the export of in-state waste into other states or to prevent out-of-state waste processors or haulers from doing business in Nebraska." Pet. App. at 26a.

The District Court ended its Commerce Clause analysis by relying on this Court's long-established balancing test as set forth in *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970). Applying the *Pike* balancing test, the District Court, as affirmed by the Eighth Circuit, concluded that

Nebraska City did not violate the dormant Commerce Clause enacting the exclusive franchise ordinance under *Pike*.

Clearly, the District Court, as affirmed by the Eighth Circuit, relied upon this Court's existing precedent in *Carbone*, *Exxon Corp.* and *Pike* in rendering its decisions. Thus, there is no conflict between the decisions in *Barker Sanitation* and any relevant decisions of this Court.

III. CERTIORARI WILL NOT BE GRANTED TO REWEIGH THE EVIDENCE AT TRIAL.

The last three reasons cited by Barker Sanitation for granting the Petition are merely asking this Court to review the evidence heard by the District Court and affirmed by the Eighth Circuit. In *General Talking Pictures Corp. v. Western Electric Co.*, 304 U.S. 175 (1938), this Court held, with respect to its certiorari granting authority, that, "Granting of the writ would not be warranted merely to review the evidence or inferences drawn from it. Moreover, the decision . . . rests on concurrent findings. They are not to be disturbed unless plainly without support." *Id.* at 178. (Internal citations omitted.)

Here, the evidentiary inferences which Barker Sanitation is asking this Court to review are based on concurrent findings of the District Court and the Eighth Circuit. The Supreme Court is not the place to review a conflict of evidence nor to reverse a Court of Appeals because this Court, in its place, may "[H]ave found the record tilting one way rather than the other, though fair-minded judges could find it tilting either way." *National Labor Relations Board v. Pittsburgh Steamship Co.*, 304 U.S. 498, 503 (1951).

The gravamen of Petitioner's Writ of Certiorari is that the District Court, as affirmed by the Eighth Circuit, accepted the wrong inferences from the factual findings. As existing precedent has clearly established, this is not appropriate grounds for review through certiorari.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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Counsel for Respondent Waste Connections of Nebraska, Inc.

Barker Sanitation LLC
Po Box 442
Nebraska City, NE 68410

Dear Customer:

We regret to inform you that as of September 1, 2004 we will no longer be providing residential and commercial sanitation services. We will be dissolving our company due to the fact that we are unable to find dependable employees, plus we have over five thousand dollars on our books of people whom have received service as long as two years ago and are yet to pay for the service we provided.

This was a decision we did not want to make, due to all the work it took to get this company started. Our goal was to provide good service for a very low rate compared to the competitors. I feel this goal was met while I, Michael Barker, was able to run the routes myself. But to keep our prices low, I was forced to take a 2nd job to make ends meet and to keep the business going. I thought I could depend on the people I hired to run things while I wasn't available, but was unaware of some of the things they were doing until recently. We apologize for the non-dependable service you may have received the past few months. This has caused a lot of stress for me and my wife, and we feel we are not able to continue to run the business the way it should be.

We appreciate all of the valued customers who stuck with us through all of this, but we can find no other way to make it work at this time.

Thank you for giving us a fair chance as a small and local company. We apologize for any inconvenience this may cause you. Any comments or concerns please feel free to write to the address above.

Thanks again and God Bless.

Sincerely,
Michael and Amy Barker
Barker Sanitation LLC

(3)

Supreme Court, U.S.
FILED
OCT 25 2004
OFFICE OF THE CLERK

No. 04-407

IN THE

Supreme Court of the United States

BARKER SANITATION,

Petitioner,

v.

CITY OF NEBRASKA CITY, NEBRASKA and
WASTE CONNECTIONS OF NEBRASKA, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT CITY OF NEBRASKA CITY, NEBRASKA

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QUESTION PRESENTED

Whether the Eighth Circuit Court of Appeals correctly affirmed the decision of the District Court for the District of Nebraska that Nebraska City Ordinance 2505-2000 does not violate the dormant Commerce Clause of the United States Constitution.

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CITY ORDINANCES

Nebraska City, Nebraska Ordinance 2505-2000 .. *passim*

STATEMENT OF THE CASE

I. *Background of the Case*

Barker Sanitation filed this lawsuit against the City of Nebraska City, Nebraska, (hereinafter "City") alleging that an ordinance (specifically Ordinance 2505-2000) adopted by the City, and the Franchise Agreement and Lease Agreement associated therewith: (1) violated the dormant Commerce Clause of the United States Constitution (Article I, Section 8, clause 3); and (2) caused a taking of its property rights in violation of the Fifth Amendment to the U.S. Constitution and Article I, Section 21 of the Nebraska Constitution.

The United States District Court for the District of Nebraska entered a Memorandum and Order dismissing Barker Sanitation's takings claim under the U.S. Constitution and the Nebraska Constitution due to lack of standing. Additionally, the Court summarily dismissed Barker Sanitation's claim that the City's decision to award the exclusive franchise to Waste Connections violated the dormant Commerce Clause of the U.S. Constitution. However, the Court allowed the case to proceed to trial as to the issue of whether the Franchise Agreement itself violated the dormant Commerce Clause.

This issue was tried in a one-day trial to the bench on July 25, 2003. In its Findings of Fact and Conclusions of Law dated November 4, 2003, and the Judgment issued in connection therewith, the District Court determined that Ordinance 2505-2000 was not discriminatory on its face, in its purpose, or in its effects and was not, therefore, overtly discriminatory. (Pet. App. B at 22a-27a). Additionally, the Court found that the Ordinance's burden on interstate

commerce was incidental and outweighed by its local benefits. (Pet. App. B at 27a-31a). As a result, the Court dismissed Barker Sanitation's claim and held that Ordinance 2505-2000, and the associated agreements, did not violate the dormant Commerce Clause provisions of the U.S. Constitution. (Pet. App. B at 31a-32a).

Barker Sanitation appealed this decision to the Eighth Circuit Court of Appeals, contending that the District Court erred in determining that the ordinance was not adopted for a discriminatory purpose, did not have a discriminatory effect, and that the local benefits of the ordinance outweighed the incidental burdens it placed on Interstate Commerce. Following argument, the Eighth Circuit Court of Appeals affirmed the District Court's decision without further discussion, finding that the case had been properly analyzed at the trial court level. (Pet. App. A at 1a-3a). In response, Barker Sanitation timely filed this petition for writ of certiorari.

II. *Misstatement of Facts*

Barker Sanitation set forth a portion of the facts material to this matter in its Petition for Writ of Certiorari. However, because not all of the facts relevant were made part of that petition, and because the City recognizes its obligation to set forth any misstatement of fact, the City sets forth the following as misstatements made by Barker Sanitation:

1) In its petition, Barker Sanitation indicates that the District Court found that "Nebraska City sought to implement a measure to keep the tonnage in Nebraska and thus increase volume at its transfer station." (Petitioner's Writ at 2). The District Court, however, did not make a finding

that the City's concern was to "keep the tonnage in Nebraska" as the Petitioner asserts. Rather, the evidence was clear, and thus the District Court found, that

> [a]n advisory committee of the Agency suggested that privatization of the Transfer Station could be a solution, but '[w]hatever solution is formulated, the bond payments still have to be made.' The committee members stated that 'their number one concern would be to rent the [transfer station] for at least the amount of the bond payments.

(Pet. App. B at 7a). No evidence indicated that during these discussions the City was concerned about keeping the tonnage within the State of Nebraska.

2) Barker Sanitation contends that

> Nebraska City decided to issue an exclusive franchise for the collection of solid waste in Nebraska City [sic] provided that prospective bidders 'will agree . . . to deliver to the Nebraska City Solid Waste Agency Transfer Station all solid waste collected within the City Limits and destined for landfill disposal subject to the currently applicable tipping fees.'

(Petitioner's Writ at 2). The evidence before the trial court clearly indicates that the Franchise Agreement itself was void of any language which required the franchisee to deliver waste collected within the City to the Transfer Station or to any other designated facility. To the contrary, the evidence indicated that

> [w]hile the RFP stated that the City was seeking proposals from qualified firms who, within the initial

> 12 months of the Franchise Agreement, would agree to take all waste collected in Nebraska City to the Nebraska City Area Solid Waste Agency Transfer Station, this requirement was never included in the Franchise Agreement and Lease with Waste Connections. (Trial Exs. 7 & 8; Tr. 206, Test. Adelung.)

(Pet. App. B at 16a).

3) In its Petition, Barker Sanitation indicates that its "normal routine was to pick up the garbage in Nebraska City and transport it back over the boarder to unload it at a transfer station in Iowa." (Petitioner's Writ. at 3). It is important to note that the City was unaware and unconcerned with where Barker Sanitation deposited the waste. Rather, it warned Barker Sanitation to cease and desist from collecting the waste because "it was violating the Ordinance and the Franchise Agreement." (Pet. App. B at 16a).

4) Barker Sanitation indicates that the District Court "found that Nebraska City Ordinance 2505-2000 was admittedly an economic motive." (Petitioner's Writ. at 8). However, the District Court actually held, "The evidence in this case establishes that several other local interests were discussed by the City Council for Nebraska City and the Nebraska City Area Solid Waste Agency before enacting the Ordinance at issue and before entering into the Franchise Agreement with Waste Connections . . ." (Pet. App. B at 28a). The District Court then listed those local interests. The trial court then concluded that

> [i]n light of the numerous local benefits that would be achieved by Nebraska City's Ordinance (and a

> Franchise Agreement and Lease entered into pursuant to the Ordinance) and the incidental burden that the Ordinance and associated agreements imposed upon interstate commerce [the Court] must conclude that the Defendant has not violated the dormant commerce clause enacting the exclusive franchise ordinance under *Pike*.

(Pet. App. B at 31a).

III. *Statement of Facts*

The City does not generally dispute the District Court's Findings of Fact which are set forth as follows:

1) The plaintiff, Barker Sanitation, is an Iowa limited liability corporation in business as a refuse collection service since February 1, 2002. The defendant, City of Nebraska City, is an incorporated governmental entity organized and existing under the laws of the State of Nebraska. The intervening defendant, Waste Connections of Nebraska, Inc., is a Delaware corporation which operates a waste collection and disposal business in the State of Nebraska. (Addendum p. 25).

2) Nebraska's Integrated Solid Waste Management Act, NEB. REV. STAT. §§ 13-2001 to 13-2043 (Lexis 1995 & Cum. Supp. 2002) requires municipalities like Nebraska City to "provide or contract for facilities and systems as necessary for the safe and sanitary disposal of solid waste generated within its solid waste jurisdiction area." NEB. REV. STAT. § 13-2020(1) (Lexis Cum. Supp. 2002). The Nebraska City Area Solid Waste Agency (the "Agency") is a joint entity

formed by the City of Nebraska City and the Village of Talmage, Nebraska, pursuant to Nebraska's Interlocal Cooperation Act, NEB. REV. STAT. § 13-801 to 13-827, that is governed by a five-member board comprised of Nebraska City's mayor and city council members. The Agency's sole purpose is ownership of the Nebraska City Area Solid Waste Agency Transfer Station ("Transfer Station") and retirement of the bonds which were issued for its construction. The Agency does not become involved in, or regulate, trash collection in Nebraska City. (Transcript pgs. 92-93, 100, 140-41, 189, Test. Adelung; Appendix pgs. 68-147; Attachment, Interlocal Cooperation Act Agreement Creating the Nebraska City Area Solid Waste Agency.)

3) At least since April of 1997, the Agency and City Council have been continually concerned about a significant drop in tonnage at the Transfer Station due to "so much competition for solid waste." An advisory committee of the Agency suggested that privatization of the Transfer Station could be a solution, but "[w]hatever solution is formulated, the bond payments still have to be made." The committee members stated that "their number one concern would be to rent the [transfer station] for at least the amount of the bond payments." (Appendix p. 73; Appendix p. 109). ("The answer to making the transfer station financially sound is to increase volume."); Appendix pgs. 122-123

> Mr. Clyde Stoll, Otoe County Commissioner, stated that the only savings the City would experience by closing the transfer station would be the $10,000 operating expenses as the bond payment and the minimum tonnage requirements are ongoing. The solution is to get the tonnage back. He suggested that the haulers sign a

> commitment to bring their trash to the transfer station.

Appendix p. 165.

> Commissioner Stark stated that we are having problems now because haulers committed to bring tonnage to our transfer station and we contracted with a landfill based on those commitments. Now the haulers are not bringing the solid waste as they had committed, leaving the transfer station in a precarious financial position.

4) On or about February 11, 2000, Nebraska City's City Council conducted a special session for the purpose of hearing from prospective bidders and to approve the issuance of a Request for Proposals ("RFP") from bidders seeking an exclusive five-year Franchise Agreement for solid waste disposal collection services within corporate limits of Nebraska City. On February 14, 2000, Nebraska City issued the RFP. The RFP repeatedly stated Nebraska City's specification that during the first year (April 1, 2000, to March 31, 2001) of the exclusive Franchise Agreement, the contractor "will agree . . . to deliver to the Nebraska City Area Solid Waste Agency Transfer Station all solid waste collected within the City Limits and destined for landfill disposal subject to the currently applicable tipping fees," as well as "[a]ll recyclables that are designated by the City and collected from the bins or otherwise from within the City." (Appendix pgs. 201-204).

5) With regard to the RFP specification that waste be delivered to the Nebraska City Area Solid Waste Agency Transfer Station, Mayor Adelung testified that:

> [D]uring this time period, we had haulers who, for one reason or another throughout this time period, began diverting their trash elsewhere. They're collecting trash and they're taking it elsewhere. The City was — My take on this is that personally and the City was concerned about the good faith efforts of who we were going to be entering into an agreement with for doing the collection because there was just kind of a lot of — I don't know if game playing is a good term to use that was going on. And so what I'm reading into this is that it was more that we were looking at good faith, that if you're going to — if we are even going to consider you having a franchise agreement to collect all of our solid waste in the City of Nebraska City, that you need to show some good faith, if you aren't collecting it now, that you would bring your trash to the transfer station as a good faith effort.
>
> You know, certainly as a council member or mayor, we did want the tonnage on February 14th, 2000 [the date the RFP was issued.]

(Transcript pgs. 198-99 & 202, Test. Adelung.)

6) The RFP also provided that from April 1, 2001, to March 31, 2005, the contractor "shall provide for disposal at a licensed Subtitle D landfill selected by and specified by the Contractor," during which time the contractor "shall agree

to pay the City a minimum franchise fee of $7,500 per month commencing April 1, 2001, and continuing for the duration of the agreement." (Appendix p. 201, ¶ 3; Appendix p. 203, ¶ 6.) The RFP gave applicants the option of submitting a separate proposal for lease or purchase of the Nebraska City Area Solid Waste Agency Transfer Station from April 1, 2001, to March 31, 2005. (Appendix p. 201, ¶ 4).

7) Three companies replied to the RFP — intervenor Waste Connections of Nebraska, Inc., Deffenbaugh Industries, Inc., and Brian Kelly — all of which were from a state other than Nebraska. On March 2, 2000, the City council for Nebraska City met with representatives from these companies to discuss their proposals. (Addendum p. 26, ¶¶ A(4)-(7).)

8) On March 21, 2000, Nebraska City Mayor Jo Dee Adelung and the City Council for Nebraska City convened jointly with the Nebraska City Area Solid Waste Agency to analyze the franchise proposals the City had received. (Appendix pgs. 175-176.) The minutes of that meeting summarize the City's interests in granting an exclusive franchise agreement: "1) making the solid waste bond payment, 2) local rates ideally remaining the same, 3) maximizing operating costs, 4) local place for yard waste, 5) satisfying contract with Hamm's Quarries." (Appendix p. 175; Transcript pgs. 121-23, 166-67 (Test. Adelung stating City's interests were accurately stated in minutes), 174-176.) During that meeting, John Heil, attorney for the City and the Agency, advised the City Council and Agency that franchising waste collection within Nebraska City and leasing the Transfer Station would be in the City's best interest because it would remove Nebraska City from the garbage business and provide certainty of citizen rates.

> The franchise fee and the lease fee that comes closest to meeting the bond payments [on the transfer station] is the best offer. Obviously the more waste that comes into the transfer station, the better the chances of meeting the required payments. The Commissioners propose to move away from financing the bond payments through taxes and make the [transfer] station self-sufficient.

Attorney Heil was directed to negotiate a lease and franchise agreement with applicant Waste Connections. (Appendix p. 176, ¶¶ 3 & 6.)

9) The Agency, in deciding whether to lease the Transfer Station to the exclusive franchisee, considered several factors: the Agency would no longer be responsible for staffing the Transfer Station; the Agency would no longer purchase equipment to operate the facility;; the Agency could focus on other aspects of the solid waste management plan, including recycling, yard waste, and composting; and the health and welfare of Nebraska City citizems. (Transcript pgs. 256-67, Test. Patrick Haverty.)

10) At another joint meeting between Nebraska City's City Council and the Agency on June 28, 2000, attorney Heil advised the Council and Agency that a franchise agreement and lease would require refinancing of solid waste revenue bonds to taxable bonds, with an estimated monthly obligation of $14,000. The proposed draft Framchise and lease Agreement each provided for a $7,000 monthly payment. "The lease, which is subject to the franchise agreement, is a seven[-]year lease with a seven[-]year renewal option. This matches the fourteen[-]year bond repayment schedule." (Appendix p. 179, ¶ 3.)

11) On July 20, 2000, Nebraska City's City Council passed and approved City Ordinance No. 2505-2000 (the "Ordinance"), which awarded to intervening defendant Waste Connections an exclusive franchise for waste collection within the corporate limits of Nebraska City. (Addendum p. 26; Appendix p. 228) Section 9 of the Ordinance provides as follows:

> The Mayor and Board of Commissioners of the City of Nebraska City, Nebraska, (the "City") hereby finds and determines that in view of the City's undertakings with respect to bonds issued by the Nebraska City Area Solid Waste Agency (the "Agency") and in order to provide for the orderly and efficient removal of solid waste within the City it is necessary and advisable for the City to enter into a Franchise Agreement with Waste Connections of Nebraska, Inc., a Delaware corporation, ("Waste Connections Nebraska") . . . ; that a Franchise Agreement with Waste Connections of Nebraska . . . [has] been prepared and submitted for approval by the Mayor and Board of Commissioners and that it is necessary and advisable that said agreement[] be approved and [its] execution authorized.

Section 11 of the Ordinance provides:

> Waste Connections of Nebraska, Inc., a Delaware corporation, is the exclusive franchisee of the City of Nebraska City for the collection and disposal of garbage, rubbish, trash or waste. It shall be unlawful for any other person to haul or collect for hire any garbage, rubbish, trash or waste for others in the city.

12) On August 30, 2000, the City and Waste Connections entered into a Franchise Agreement pursuant to the terms of the Ordinance. (Addendum p. 26; Appendix pgs. 231-245.) The preamble to the Agreement expresses the City's "desire . . . to contract with an independent contractor to provide for the operation of its municipal solid waste collection system in order that the public health and safety of the citizens of the City may be protected and preserved;" the fact that the City's solid waste collection system involves the collection and removal of recyclables and waste within the City limits and the use of a Transfer Station for receipt and transfer of such waste; the City's willingness to grant Waste Connections "an exclusive franchise for the collection and removal of recyclable[s] . . . and [waste] from the residences and businesses located in the City as part of an agreement for the operation of the municipal waste collection system;" and that Waste Connections would enter "into a Lease Agreement with the Nebraska City Area Solid Waste Agency for exclusive use of the Transfer Station for a term coterminous with this Agreement." (Appendix p. 231.)

13) The Franchise Agreement provides that Waste Connections "shall utilize a licensed subtitle D landfill disposal facility, in which Municipal Solid Waste collected from within the City limits shall be deposited." (Appendix p. 234, ¶ 8.) The City has agreed not to license or grant permits to any other waste or recyclable collector within City limits during the term of the Agreement, and Waste Connections has agreed to accept and process recyclables and waste at the Nebraska City Transfer Station pursuant to the terms of a separate Lease Agreement with the Nebraska City Area Solid Waste Agency. (Appendix p. 234, ¶¶ 10 & 12.)

14) The term of the Franchise Agreement is seven years, during which Waste Connections must pay the City a franchise

fee of $588,000, or monthly installments of $7,000. Waste Connections may renew the Agreement for one additional seven-year term, provided that Waste Connections also renews its Transfer Station Lease Agreement with the Nebraska City Area Solid Waste Agency for an additional seven years. (Appendix pgs. 246-247, 255.)

15) Also on August 30, 2000, the Nebraska City Area Solid Waste Agency and Waste Connections of Nebraska, Inc., entered into the Lease referred to in the Franchise Agreement, allowing Waste Connections to lease the property on which the Transfer Station sits for seven years, during which Waste Connections must pay the Agency $588,000, or monthly installments of $7,000. Waste Connections may renew the Lease for one additional seven-year term, provided that Waste Connections also renews its Franchise Agreement with Nebraska City for an additional seven years. (Appendix p. 246; ¶¶ 2, 4-5, 31.)

16) At the time the Franchise and Lease Agreements were entered into with Waste Connections, Mayor Adelung and City Finance Commissioner Patrick Haverty — who were both members of the City Council and the Solid Waste Agency — believed that if the Agency could not pay the bonds, the City would be financially responsible. (Transcript p. 191, Test. Adelung; Transcript p. 268, Test. Haverty.)

17) While the RFP stated that the City was seeking proposals from qualified firms who, within the initial 12 months of the Franchise Agreement, would agree to take all waste collected in Nebraska City to the Nebraska City Area Solid Waste Agency Transfer Station, this requirement was never included in the Franchise Agreement and Lease with Waste Connections. (Appendix pgs. 231-259; Transcript p. 206, Test. Adelung.)

18) In February, 2002, plaintiff Barker Sanitation began providing services to customers within Nebraska City. On May 9, 2002, Barker Sanitation received a letter from Nebraska City's legal counsel notifying Barker that it was violating the Ordinance and the Franchise Agreement. The letter warned that violation of the Ordinance could result in criminal fines or confinement and that each day such violation continued would constitute a separate and distinct offense. The City's legal counsel warned Barker Sanitation to cease and desist immediately, as the City intended to enforce the terms of the Ordinance. (Addendum pgs. 26-27; Appendix p. 260.)

19) Barker Sanitation's counsel responded to the City's cease-and-desist letter with a September 25, 2002, letter that characterized the City's ordinance as "improper flow control" which violates "the dormant provisions of the Interstate Commerce Clause." (Appendix pgs. 261-262.) In an October 7, 2002, City council meeting at which Barker's letter was addressed, Mayor Adelung stated:

> It was probably pertinent and important that maybe it's time that we go back to the citizens and explain one more time why we're in the position we are and the reason for the cost of the fees being as high as they are is because they have the bond payments, have to make the bond payments, and that the fee structure and the agreement for the lease fixed that, I mean, it was exact amount. We know what payment to the bonds are. That's why we are paying what we are paying for the garbage rates.

(Transcript pgs. 184-85, Test. Adelung.)

20) On other occasions in the past two years, the Nebraska City Mayor Adelung has explained to citizens the reason for the exclusive Franchise Agreement and Transfer Station Lease:

A. . . . I have talked on several occasions on the radio and everywhere else about that fact that we weren't generating enough revenue to provide the solid waste facility and our solid waste program for the City of Nebraska City and that included the bond payments.

Q. And so you were expressing to the citizens that it was an economic issue, correct?

A. That is correct.

Q. And that instead of going to taxes and taxing citizens, this was a better option of assessing and — or providing the franchise agreement, correct?

A. That is correct.

Q. And that was to protect the economic interest of Nebraska City, correct?

A. That is correct.

(Transcript pgs. 139:9-140:6, Test. Adelung).

21) Not all waste collected in Nebraska City pursuant to the exclusive Franchise Agreement goes to the Transfer Station for processing — for instance, Waste Connections

takes three roll-off container loads per week from a meat-packing plant directly to a Subtitle D landfill in Nebraska instead of to the Transfer Station first. Logistical issues have also caused Waste Connections to dump residential waste at other Subtitle D facilities, instead of at the Transfer Station in Nebraska City. Of the waste collected at the Nebraska City Transfer Station, Waste Connections routinely delivers some percent of it to the Mills County or Loess Hills Landfill in Iowa. (Transcript pgs. 272-73 & 285, Test. Scott Blanford (11 percent went to Iowa landfill during month of trial.)) *See* (A39-50: Findings of Fact and Conclusions of Law ¶¶ 1-21).

SUMMARY OF THE ARGUMENT

The trial court correctly determined that Ordinance 2505-2000 and the associated Franchise and Lease agreements did not violate the dormant Commerce Clause. The Commerce Clause allows Congress to regulate interstate commerce, while the dormant Commerce Clause "is the negative implication of that clause. More specifically, the dormant provisions of the Commerce Clause prohibit states from enacting laws that discriminate against or unduly burden interstate commerce." *South Dakota Farm Bureau, Inc. v. Hazeltine*, 340 F.3d 583, 592 (8th Cir. 2003) *citing Quill Corp. v. North Dakota*, 504 U.S. 298, 312, 112 S. Ct. 1904, 119 L. Ed. 2d 91 (1992).

> The recognition of the dormant Commerce Clause carries out 'the Framers' purpose to prevent a State from retreating into economic isolation or jeopardizing the welfare of the Nation as a whole, as it would do if it were free to place burdens on the flow of commerce across its borders that commerce wholly within these boarders would not bear.'

Hazeltine, 340 F.3d at 593 (internal citations omitted.)

In this case, Barker Sanitation contends that the ordinance enacted by the City, and the exclusive Franchise and Lease agreements that were executed as a result thereof, violate the dormant provisions of the Commerce Clause. However, the ordinance and the agreements are not overtly discriminatory against Interstate Commerce. *See South Dakota Farm Bureau, Inc. v. Hazeltine*, 340 F.3d 583, 592 (8th Cir. 2003); *S.D.D.S., Inc. v. South Dakota*, 47 F.3d 263 (8th Cir. 1995). Indeed, it is undisputed that neither the Ordinance nor the associated agreements facially discriminate against out-of-state interests. Further, there is no evidence which suggests that they discriminate either by their purpose or through their effects. *Id.* Finally, an application of the *Pike* balancing test reveals that the local benefits of the ordinance outweigh any burden imposed on Interstate Commerce. *See Pike v. Bruce Church, Inc.*, 397 U.S. 137, 90 S. Ct. 844, 25 L. Ed. 2d 174 (1994).

Because Barker Sanitation failed to produce evidence which either demonstrated that the ordinance and agreements were overtly discriminatory, discriminatory in their purpose or their effect, or that the local benefits were outweighed by the burdens imposed on Interstate Commerce, it was correctly determined that Barker Sanitation's claim against the City was without merit. As a result, that decision should stand and the petition for writ of certiorari should be denied.

REASONS FOR DENYING THE PETITION

Barker Sanitation contends that its petition for writ of certiorari should be granted because the Eighth Circuit Court of Appeals' decision to affirm the district court's judgment that conflicts with several of this Court's precedents relating to the dormant Commerce Clause. To summarize, Barker Sanitation argues that the appellate court erred when it upheld the District Court's finding that: (1) the Ordinance did not have a discriminatory purpose; (2) the Ordinance did not have a discriminatory effect; and (3) the incidental burdens on interstate commerce were minimal. These findings, Barker Sanitation argues, are contrary to rules set forth in several decisions handed down by this Court. However, Barker Sanitation fails to recognize that the facts presented in the cases cited differ from those in the case at bar. A correct application of the rules set forth in the cases cited merits a different result due to these factual distinctions. Because the analysis of the District Court is consistent with that applied in the cases cited by Barker Sanitation, the appellate court correctly affirmed this decision. Therefore, the petition for writ of certiorari should be denied.

I. THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED BECAUSE THE DISTRICT COURT'S FINDING THAT THE ORDINANCE, FRANCHISE AGREEMENT, AND LEASE AGREEMENT DO NOT CREATE A FLOW CONTROL SCHEME WAS CONSISTENT WITH THIS COURT'S DECISION IN *CARBONE*.

First, Barker Sanitation contends that the Court of Appeals erred in determining that Ordinance 2505-2000 was not a flow control scheme implemented in order to control the processing of solid waste and hoard the economic benefit

purely for the purpose of protecting a local economic interest. This decision, Barker Sanitation argues, is inconsistent with this Court's holding in *C & A Carbone, Inc. v. Town of Clarkstown, New York*, 511 U.S. 383, 114 S. Ct. 1677 (1994). In actuality, however, the lower court's decision in this case is directly in line with the *Carbone* case. *Carbone*, however, presents a significant factual difference that distinguishes this case and thus requires a different result.

Specifically, *Carbone* presented facts in which the law at issue discriminated against out-of-state interests on its face by specifically prohibiting in-state waste from leaving the state. *C & A Carbone, Inc. v. Clarkstown*, 511 U.S. 383, 114 S. Ct. 1677, 128 L. Ed. 2d 399 (1994). In *Carbone*, there was direct, facial evidence that the state sought to insulate itself economically from the competition of out-of-state entities. Indeed, Barker Sanitation acknowledges that the ordinance in *Carbone* "required all nonhazardous solid waste from within the town to be deposited at the transfer station." (Petitioner's Writ at 7). In contrast to the *Carbone* ordinance, Ordinance 2505-2000 contains no such requirement. There is no language in the Ordinance, franchise agreement, or lease agreement which specifically prohibits waste from leaving the City or the State of Nebraska. In fact, there is no language which specifically directs Waste Connections where to take the waste. It is not required to go to the transfer station nor is it required to be deposited in another specified location. The solid waste is allowed to leave the City for out-of-state locations. Out-of-state waste may be brought into the City's transfer station. This key factual distinction required the District Court to reach a different conclusion than that reached by this Court in *Carbone*. As a result, the District Court's decision is consistent with *Carbone* and the petition for writ of certiorari should be denied.

II. The Petition for Writ of Certiorari Should Be Denied Because the District Court's Finding that Ordinance 2505-2000 Was Not a Local Processing Requirement that Violates the Dormant Commerce Clause is Consistent with Prior Decisions of This Court.

Barker Sanitation next contends that the Appellate Court erred in affirming the District Court's finding that City Ordinance 2505-2000 was not a local processing requirement that violates the dormant commerce clause, and that this decision is inconsistent with several of this Court's previous decisions. (Petitioner's Writ at 8-9). Barker Sanitation argues that "the issue is not whether the waste ultimately ended up in an in-state or out-of-state landfill, but rather an ordinance that hoards waste for local processing at the transfer station at the cost of interstate commerce." (Petitioner's Writ at 9).

Again, nothing in the Ordinance, Franchise Agreement, or Lease Agreement requires Waste Connections to process the waste locally. The evidence presented at trial indicated that Waste Connections actually processed a portion of the waste out-of-state. (Pet. App B at 18a). As a result, the waste simply is not "hoard[ed] for local processing at the transfer station" as Barker Sanitation contends. Consequently, the district court's decision is consistent with the rules set forth by this Court.

III. The Court of Appeals's Decision to Affirm the District Court's Finding That The Ordinance Did Not Have a Discriminatory Effect Is Consistent with Prior Decisions of This Court.

As its third argument as to why its petition for certiorari should be granted, Barker Sanitation contends that Ordinance 2505-2000 is discriminatory through its effects. It is true that a regulation that is facially neutral and not purposed with a discriminatory intent may, in its practical effect, discriminate against interstate commerce. *See, e.g., Maine v. Taylor*, 477 U.S. 131, 148 n.1, 106 S. Ct. 2440, 2453 n.19 (1986) (facially neutral statute but discriminatory effect.) However, the Ordinance at issue simply does not have a discriminatory effect. As a result, the trial court decided, and the appellate court correctly affirmed, that the ordinance did not violate the dormant Commerce Clause in this regard.

Barker Sanitation claims that the ordinance prevents out-of-state competitors from processing the City's waste because Ordinance 2505-2000 grants an exclusive franchise to Waste Connections. However, Barker Sanitation presented no evidence which indicated either that the collection or the disposal aspects of the solid waste market were impacted by Barker's absence from the interstate marketplace. Rather, the evidence presented at trial clearly demonstrated that the Ordinance does not control where the waste collected from within the City is deposited. (Pet. App. B at 12a-16a). Similarly, Barker Sanitation presented no evidence to support its contention that out-of-state recipients were denied waste as a result of the Ordinance. To the contrary, the evidence presented at trial indicated that Waste Connections disposed of solid waste collected from within the City in other states such as Iowa at times. (Pet. App. B at 18a).

With respect to the collection market, Barker Sanitation has admittedly been impacted by the Franchise Agreement, as the agreement prohibits it from hauling waste from the City. However, Barker Sanitation did not demonstrate that a local interest was given preference over an out-of-state interest or that the former has benefitted at the expense of latter as is required to show discrimination against interstate commerce. *Oregon Waste Sys., Inc.*, 511 U.S. at 99, 114 S. Ct. at 1350 (1994). Rather, the evidence before the trial court was that Waste Connections is an out-of-state hauler that competed with, and prevailed over, two other out-of-state entities in obtaining what is, in effect, the one permit issued to collect solid waste from within the City. (Pet. App. B at 10a). Where in-state and out-of-state interests are equally affected by a local regulation, that is strong evidence that the ordinance is even-handed and not discriminatory. *See South Carolina State Highway Dep't v. Barnwell Bros, Inc.*, 303 U.S. 177, 187, 58 S. Ct. 510, 514 (1938); *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. at 471-72, 101 S. Ct. at 728-29 (1981).

Under Nebraska law, a municipality has an affirmative duty to supervise and control collection and disposal of garbage within its corporate limits. *Tracy v. City of Deshler*, 253 Neb. 170, 174-75, 568 N.W.2d 903, 907 (Neb. 1997); Neb. Rev. Stat. § 13-2023 (Reissue 1997). This can include a single, city-wide contract. *See Tracy, supra* (upholding City's right to go to city-wide hauling against private hauler's state takings claim). Furthermore, "[n]egatively affecting interstate commerce is not the same as discriminating against interstate commerce." *Cotto Waxo Co. v. Williams*, 46 F.3d 790, 794 (8th Cir. 1993). Thus, even if there has been some decrease in the volume of waste making its way to out-of-state facilities or in the numbers of haulers which may haul

within the City, or an increased cost to consumers as a result of the Ordinance, that negative effect on interstate commerce is not the same as discrimination against interstate commerce. To conclude otherwise would result in paralysis for municipalities in attempting to address matters within their traditional responsibilities, where the regulations impacted interstate commerce.

In this case, Barker Sanitation failed to prove that the ordinance at issue, and the associated agreements, had a discriminatory impact on interstate commerce. While they have impacted Barker Sanitation, that impact is particular to Barker Sanitation only. The Commerce Clause is not designed to protect either the "particular structure or methods of operation in a . . . market," *CTS Corp. v. Dynamic Corp. of America*, 481 U.S. 69, 93-94 (1987), or particular interstate firms. *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 127-28, 98 S. Ct. 2207, 2214-15 (1978). While Barker Sanitation may be unable to haul from homes and businesses in the City, the interstate market has not been hindered. Solid waste is allowed to leave the City and the State of Nebraska; the franchisee which is the exclusive hauler for the City is an out-of-state entity, not a local entity benefitted at the expense of out-of-state haulers. Under Nebraska law, the City was authorized to contract with a single hauler. *Tracy*, *supra*. Consequently, while the circumstances may have negatively impacted Barker Sanitation, they did not have a discriminatory effect against interstate commerce. Therefore, the decision of the Appellate Court to affirm the District Court's judgment is consistent with previous decisions of this Court and the petition for writ of certiorari should be denied.

IV. The Petition for Writ of Certiorari Should Be Denied Because the District Court's Finding that Ordinance 2505-2000 Did Not Have a Discriminatory Purpose Was Consistent with This Court's Prior Decisions.

Barker Sanitation also contends that the Ordinance and associated agreements had a discriminatory purpose, and that the Court of Appeals erred in affirming the District Court's decision that it did not. The City does not dispute the fact that it considered local economics when determining whether to adopt the ordinance at issue. These local economic motivations and concerns, however, do not, in and of themselves, prove that the resulting ordinance, Franchise agreement, and Lease agreement had a discriminatory purpose as Barker Sanitation contends. Indeed, the test for determining whether a discriminatory purpose exists is whether the law at issue "operate[s] as economic protectionism and serve[s] to protect in-state economic interests *at the expense of out-of-state competitors*." *City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978) [Emphasis added.]

In this case, Barker Sanitation failed to prove that the ordinance and associated agreements "protect[ed] in-state economic interests at the expense of out-of-state competitors." *Id. See generally, C & A Carbone, Inc.*, 511 U.S. at 398-94 (1994); *Hazeltine*, 340 F.3d at 593-96 (2003); *S.D.D.S., Inc.*, 47 F.3d at 268-71. While they do protect the City's economic interests, there is nothing in the Ordinance itself or in the Franchise or Lease Agreements that prohibits Waste Connections (or anyone else for that matter) from taking their waste to other states or that requires them to

deposit their waste at the local transfer station. (Pet. App. B at 14a-18a). In fact, the evidence demonstrates that Waste Connections does in fact transport some of its solid waste to places other than the transfer station and outside the State of Nebraska. (Pet. App. B at 18a). As a result, the only effect of the ordinance and its associated agreements is to require the City's residents to use Waste Connections for solid waste removal *if* those individuals choose to retain such a service.

Further, there is no evidence to suggest that the process by which the City adopted the ordinance was discriminatory in nature. The City issued its Request for Proposals and obtained such proposals from interested entities. (Pet. App. B at 10a). The City did not place any sort of restrictions on who could submit a bid on the project. *Id.* Each entity that placed bids was an out-of-state entity. *Id.* As a result, any argument by Barker Sanitation that the City intended its RFP process to prohibit out-of-state entities from being awarded the franchise agreement is completely without merit and wholly unsupported by the evidence.

To summarize, Barker Sanitation has not, because it cannot, produced evidence which indicates that the Ordinance at issue has a discriminatory purpose. *See Eastern Ky. Resources v. Fiscal Court of Magoffin County, Ky.*, 127 F.3d 532, 542-43 (6th Cir. 1997) (party presenting circumstantial evidence of discriminatory purpose must show the impact such evidence has on the challenged regulation.) While there is evidence that the City considered the local economics of the Transfer Station, the District Court correctly determined, and the Court of Appeals correctly affirmed, that "constitutionality [of the ordinance] will be by its effects upon interstate, not local, commerce." (Pet. App. B at 26a). This decision is consistent with the rule established by this Court in *Carbone*, and thus the petition for writ of certiorari should be denied.

V. The Petition for Writ of Certiorari Should Be Denied Because the District Court's Finding that Ordinance 2505-2000 Did Not Violate the Commerce Clause Because Its Local Benefits Outweighed Its Incidental Burden is Consistent with Prior Decisions of this Court.

Once a court determines that the challenged law is not overtly discriminatory (that is it is not discriminatory on its face or in its purpose or through its effects), it proceeds to the second tier of its analysis. Specifically, the court may still strike down the law "if the burden [the law] imposes on interstate commerce 'is clearly excessive in relation to the putative local benefits.'" *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1994). In applying this test, the District Court correctly determined that the burden imposed on interstate commerce was incidental when weighed against local benefits.

First and foremost, the City acknowledges that the Ordinance, Franchise Agreement, and Lease Agreement benefit it by ensuring the ability to finance its debt on the Transfer Station. However, the evidence demonstrates that this benefit was not the only benefit considered by the City and the Nebraska City Area Solid Waste Agency before enacting the Ordinance at issue and entering the franchise and lease agreements with Waste Connections. In its Findings of Fact and Conclusions of Law, the district court identified those benefits as being:

> obtaining certainty of local garbage collection rates; minimizing operating costs of the Transfer Station; having a local collection point for yard waste; satisfying the City's contract with Hamm's

> Quarries; removing Nebraska City from the garbage business; relieving the Agency from its duties of staffing the Transfer Station and purchasing equipment to operate the facility; allowing the Agency to focus on other aspects of the solid waste management plan, including recycling, yard waste, and composting; and the health and welfare of Nebraska City citizens.

(Pet. App. B at 28a).

These benefits outweighed any burden the arrangement may have on interstate commerce. In fact, the burden this Ordinance creates on interstate commerce is minimal at most. As the District Court stated:

> It is difficult to detect what burden on interstate commerce is imposed by the Ordinance in this case when the Ordinance does not prohibit Waste Connections from taking Nebraska City waste to any in-state or out-of-state transfer facility or landfill (so long as it is a licensed subtitle D landfill disposal facility) and when the Ordinance in no way restricts out-of-state waste from being brought to, and processed in, the Nebraska City Transfer Station. Indeed, the evidence shows that some percent of the waste collected at the Nebraska City Transfer Station is routinely delivered to an Iowa landfill . . .

(Pet. App. B at 30a).

This analysis is consistent with that set forth by this Court in *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 90 S. Ct. 844 (1994) as no evidence was presented to indicate that the goals of the City were accomplished by the illegitimate means of isolating the state from the national economy. Indeed, Barker Sanitation has not put forth evidence regarding the amount of solid waste that left the City for an out-of-state destination prior to the adoption of the Ordinance. There is not evidence that out-of-state entities have not been able to bring waste to the Transfer Station. The only evidence presented is that Barker Sanitation has not been able to collect waste from within the City because the City granted an exclusive franchise to another out-of-state entity. This evidence alone was insufficient to prove that the effect on the interstate market was anything more than incidental. As a result, the petition for writ of certiorari should be denied.

CONCLUSION

The District Court's decision to dismiss Barker Sanitation's claim against the City, and the Appellate Court's affirmation of this decision, is consistent with the rules and analyses set forth by this Court in prior decisions. Ordinance 2505-2000, and the franchise and lease agreements associated therewith, did not discriminate against interstate commerce on their face, in their purpose, or in their effect. Further, the incidental burdens on interstate commerce this Ordinance has is minimal when compared with the local benefits. As a result, the petition for writ of certiorari should be denied.

Respectfully submitted,

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